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HISTORICAL DEVELOPMENTS AFFECTING AMERICAN EDUCATIONAL PROCESSES.
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*CONSTITUTIONAL HISTORY, LAWS, *EQUAL PROTECTION, SUPREME COURTS, *COURT DOCTRINE, EDUCATIONAL POLICY, *ADMINISTRATOR RESPONSIBILITY, *SCHOOL POLICY, SCHOOL ADMINISTRATION, CRIME, RELIGION, MARRIED STUDENTS, HEALTH PROGRAMS, *COURT LITIGATION, LOUISVILLE, KENTUCKY

QUESTIONNAIRES (1,000) WERE MAILED TO SCHOOL DISTRICTS IN THE 50 STATES. THE FINAL SAMPLE GROUP CONSISTED OF 350 USABLE RESPONSES. THE STUDY DEALT WITH THE CONSTITUTIONAL RIGHTS AND RESPONSIBILITIES OF STUDENTS, TEACHERS, AND SCHOOL ADMINISTRATORS. PERSONAL INTERVIEWS SUPPLEMENTED THE QUESTIONNAIRES. THE MAJOR TOPICS OF INQUIRY WERE (1) FREEDOM OF SPEECH AND RIGHT OF ASSEMBLY, (2) CRIME INVESTIGATION, (3) RELIGION, (4) STUDENT MARRIAGES, (5) STUDENT HEALTH, AND (6) EXPULSION OF STUDENTS. THE AUTHORS RECOMMENDED THAT (1) SCHOOL ADMINISTRATORS BE FURNISHED INSTRUCTION IN THE IMPLICATIONS OF CONSTITUTIONAL LAW AND BE PROVIDED HANDBOOKS OF GUIDELINES AND RECENT COURT DECISIONS, AND THAT (2) SCHOOL REGULATIONS BE REVIEWED PERIODICALLY BY LEGAL COUNSEL. (JK)

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HISTORICAL DEVELOPMENTS AFFECTING AMERICAN EDUCATIONAL PROCESSES

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Laurence W. Knowles
W. Scott Thomson

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INTRODUCTION

The title of this project, Historical Factors Affecting American Education Processes, tells the reader nothing save that the contents somehow will deal with education in the United States. Thus, a more than perfunctory task falls to this introduction. Most simply, this study is an attempt to explain the application of the United States Constitution to public school students in the United States. The research goes far beyond the well-known cases, such as the Flag salute controversy and the Supreme Court decisions on prayer and Bible reading.[1] Moreover, many of the subjects considered have not been, or have rarely been, in court.

The reasons for the lack of litigation are manifold. The principle one is that neither students nor teachers are aware of the constitutional implications of their actions. Another reason is that the cost of litigation may make a lawsuit a prohibited avenue of redress. This fact brings up the ethical implication inherent in the study, i.e. should the school knowingly violate a right of a student when the school knows the student will not bring a lawsuit.[2] A third factor contributing to the dearth of litigation is that parents and students fear retaliation by the school. And this fear is not always baseless as the following account given by one midwestern educator attests:

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[1] On the other hand, the School Segregation Cases, 347 U. S. 483 (1954), and their progeny are intentionally omitted. So much has been written on these problems that any comment made at this date would only be in the me-too class.

[2] One schoolman, when queried whether he had experienced any difficult problems of constitutional import, replied: "So far so good. Our minorities here have been tolerant."

> In 1958 we expelled four students for skipping away from school and going on a week-long tour and getting married. We were sued by one parent and the court ordered that we re-admit one girl. The board of course had no choice but honor the order. They stipulated numerous conditions for the girl to meet, (she) being practically isolated from all other students. The girl then chose not to return to school.

Again, a lawsuit may take too long, and the harm may become permanent (e.g. a boy forbidden to play football in his senior year will probably graduate before his case is decided by a court). Still other less recurring causes, such as compromise, account for the lack of lawsuits. Nevertheless, the fact remains that many of the constitutional issues in public education have not reached the courts.

The non-litigated character of many of the problems considered herein adds to the importance of the study, for it may chart courses of action for the constitutionally conscious school man. The non-litigated character of the problems also forces a legal analysis into a search for analogous situations in which there have been court decisions. Consequently, the reader will find a search of a pupil's locker compared to the search of a suspected felon's desk or safe deposit box. Or a principal's interrogation of a student compared to a fire marshal's investigation of a suspected arsonist. The author has attempted to minimize the chance of error inherent in analysis by analogy. The reader's disagreements with the comparisons are welcome. The author does want to note, however, that he is aware of the pitfalls of analogy, but cannot, save in an occasional footnote, digress to detail the similarities of compared situations.

The procedure of the project warrants some comment. One thousand questionnaires were mailed to school districts in the fifty States. Close to 400 responded and 350 were finally selected as the sample group.[3] The purpose of the questionnaires was to ascertain how schools actually handled situations having constitutional implications. After identifying the various ways the situations were handled, the research began. As the research brought out issues not covered by the questions in the questionnaire, personal interviews were made to fill the gaps in information as regards school practices. The results follow.

---

[3] The questionnaires were sent to randomly selected school districts. The questionnaires were just as randomly returned. Consequently, no effort will be made to represent that a certain percentage of school districts in the United States have this regulation or that regulation. The data is inadequate for that purpose. The principle thrust of the returned sampling is to isolate institutionalized regulations. In other words, if a regulation appeared in many replies, it may be safely cited as one accepted way of dealing with a problem.

A secondary, but important, function of the questionnaires was to sample the various approaches to single problems. Here again it can't be said that a certain small percentage of schools treat a problem uniquely; the data is not geared to this conclusion. On the other hand, it can be said how one or two school districts actually handled a certain situation.

CHAPTER I

THE UNITED STATES CONSTITUTION AND THE SCHOOLS

SOME PRELIMINARY CONSIDERATIONS

> Our greatest problem [in school administration] has been the imposition of the will of a few upon the vast majority through appeals to the courts, i.e. Supreme Court decisions. We have no difficulty with what is good for youth, only with that which we must impose on youth to their detriment.*
>
> [Name of school district withheld]

The Fourteenth Amendment, the main source of Federal powers over State-person relationships, provides in part: [1]

> No State shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The Amendment was passed to guarantee newly freed slaves some degree of fair treatment by the governments of the former Confederate States.

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*All policy statements quoted in this report are actual statements of school officials throughout the country.

[1] The entire text of Section 1 of the Fourteenth Amendment is:

> Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

However, its sweeping language (there is no reference to Negro in the Amendment) made it a bulwark for all persons against acts of oppression or unfairness by State governments. [2]

Since the passage of the Amendments, hundreds of Supreme Court decisions have defined and redefined the constitutional implications of its terse phrases. Some of these refinements deserve discussion to show the relevancy between the Amendment and the schools.

No State shall . . .

A State cannot act but through its agents, and its agents are every public official clothed in some wrapping of official authority. And if an official has this wrapping of authority he acts as the State even though he may surpass his authority, or even violate State law. [3] Going no further, it is clear that every school employee, from janitor to superintendent, is a State agent within the intendment of the Fourteenth Amendment. Once cloaked in authority the fact of compensation becomes irrelevant. Thus, members of boards of education are State agents, as are volunteer aids.

---

[2] Not without some hesitation, however. The first case involving the Amendment contained the following statement by the Court:

> We doubt very much whether any action of a State not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.
>
> Slaughter-House Cases,
> 16 Wallace 36, 81, 21 L.Ed. 394, 410 (1873).

This doubt did not survive the nineteenth century.

[3] Screws v. U. S., 325 U. S. 91 (1945).

. . . deprive any person . . .

Children are persons within the compass of the Fourteenth Amendment. This does not mean the Amendment guarantees them all the rights of adults, but it does mean that the Amendment protects some rights they have as children. This fact is shown vividly by the Court's opinion in the School Segregation Cases,[4] in which it held that the State may not inflict psychological harm on its young citizens. On the other hand, because of their immaturity children may be subjected to greater State regulation than their adult counterparts, e.g. marriage laws. The residual fact remains, however, that children do have some rights protected by the Fourteenth Amendment.

. . . of life, liberty, or property . . .

Virtually all human rights may be placed within the ambit of these words. The process is tautological, as indeed it must be. That is to say, if a court defines the use of a loud speaker as a liberty, the court is pragmatically saying the use of a loud speaker is to be protected.[5] Similarly, a court may decide that the air space several hundred feet above a person's land is property, and that the air space is protectable -- but here again isn't this court simply saying that the air space should be protected and, consequently, should be classified as property? [6] Over the centuries the Supreme Court has defined and redefined a myriad of activities as rights of liberty and rights of property. Moreover, these rights have not been finally demarcated, nor can they be. In the end these rights are those human activities which contemporary American society, speaking through its courts, deems necessary to be protected against State infringement.

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[4] 347 U. S. 483 (1954).

[5] Cf. Kovacs v. Cooper, 338 U. S. 77 (1949).

Parental rights in children are also rights yet to be definitely set out in constitutional terms. Whether these rights are labelled property interests or part of parental freedoms is irrelevant. What is necessary is the recognition that parents, as well as the children themselves, do have real, though not clearly defined, interests in child training and education, and that these interests are of constitutional dignity.

. . . without due process of law . . .

This phrase modifies the preceding human freedoms. It colors the whole Amendment insofar as it backs down from an absolute protection of the enumerated freedoms to a protection which guarantees only due process of law. In other words, the Amendment does not declare that a State cannot deprive a person of life, liberty or property. The State may take a criminal's life, but it must give the criminal a fair trial. [7] And the State may take a person's property but the State must compensate him therefor .[8] And the State may sterilize its citizens, but it must have reasonable grounds to do so.[9]

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[6] U. S. v. Causby, 328 U. S. 256 (1946).

[7] Adamson v. California, 332 U. S. 46 (1947).

The tautology which characterized the definitions of life, liberty and property reappears in the phrase due process of law. The Supreme Court has described the rights implicit in due process of law as:

> . . . the very essence of a scheme of ordered liberty.[10]
>
> * * *
>
> principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.[11]
>
> * * *
>
> . . . fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.[12]

These descriptions do not refine due process and, in fact, only restate one another. Nevertheless, the inescapable implication is that due process simply means the minimal procedural safeguards and the inviolable personal freedoms that the Court will accord the individual.[13]

---

[8] Chicago, B & Q R.R. v. Chicago, 166 U. S. 226 (1897).

[9] Buck v. Bell, 274 U. S. 200 (1927) Cf. Skinner v. Oklahoma, 316 U. S. 535 (1942).

[10] Palko v. Connecticut, 302 U. S. 319, 325 (1937).

[11] Snyder v. Massachusetts, 291 U. S. 97, 105 (1933).

[12] Herbert v. Louisiana, 272 U. S. 312, 316 (1826).

[13] Griswold v. Connecticut, 381 U. S. 479 (1965).

. . . nor deny to any person within its jurisdiction the equal protection of the laws.

This phrase does not mean that a State may not treat its citizens differently. It simply means that if it does treat its citizens differently, it must do so on reasonable grounds. In other words, there must be a valid distinction between the differently treated classes which justifies the dissimilar treatment. For example, women may be treated differently from men as regards maximum hours of work laws, but not differently as regards qualifying to vote. Conscientious objectors may be treated differently on issues of selective service, but not on issues of what schools they must attend.[14]

Indeed, the philosophy that each person should be treated the same by a government is implicit in due process of law. The Supreme Court articulated this thesis in a case involving segregation in the District of Columbia public schools. The court said:

> The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause, as does the Fourteenth Amendment which applies only to the States. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process of law. [footnote omitted]
>
> Bolling v. Sharpe, 347 U. S. 497, 498-99 (1954)

---

[14] But cf. Hamilton v. Regents of University of California, 293 U. S. 245 (1934).

The foregoing is a sketch of the rudiments of constitutional theory as it will be applied to schools practices. The following chapters will consider the applicable constitutional concepts in more detail as they apply to school operations

CHAPTER II

HIGH SCHOOL SOCIETIES AND FREE SPEECH

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.

Originally intended to apply only to the Federal Government, freedom of communication was to wait to the twentieth century [1] before it was expressly declared a Fourteenth Amendment right, and thus secure against State violations.[2]

On the other hand, the dimensions of the rights of free speech and assembly have not been drawn. At one pole are the considerations exemplified by the famous quote of Justice Holmes:[3] "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." In line with this thinking are precedents establishing that persons may not form associations for the perpetration of crimes.[4] Nor can persons gather together to riot.[5] In other words, the right of association is not absolute. It may be limited by State laws designed to protect a State interest. However, the point where the State interest outweighs the right of association is not clearly defined. The Supreme Court has charted the balancing process as follows:[6]

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[1] Whitney v. California, 274 U. S. 357 (1927); DeJonge v. Oregon, 299 U. S. 353 (1937).

[2] In Thomas v. Collins, 323 U. S. 516, 542 (1945), Justice Rutledge concluded that the right to peaceable assembly:

> . . . is a national right, Federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor altogether, nor the Nation itself, can prohibit, restrain or impede.

[3] Schenck v. U. S., 249 U. S. 47, 52 (1918).

> When particular conduct is regulated in the interest of public order and the regulation results in an indirect conditional, partial abridgment of speech the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented.

The Court, pursuant to this balancing process, has determined that the Klu Klux Klan[7] may be more strictly regulated than a religious association;[8] and the Communist Party[9] may be subjected to more governmental restraint than a labor union.[10]

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[4] U. S v. Crimmins, 123 F.2d 271 (2nd Cir. 1941).

[5] State v. Woolman, 84 Utah 23, 33 P.2d 640 (1934).

[6] American Communications Assn., CIO v. Douds, 339 U. S. 382, 399 (1950).

[7] People ex rel Bryant v. Zimmerman, 278 U. S. 63 (1928). Compare N.A.A.C.P. v. Alabama, 357 U. S. 449 (1958).

[8] Niemotko v. Maryland, 340 U. S. 268 (1951).

[9] Communist Party v. Subversive Activities Control Board, 367 U. S. 1 (1961).

[10] Thomas v. Collins, 323 U.S. 516 (1945).

With this balancing process in mind, the specific problem of school regulation of high school societies may be considered.[11]

I. THE PRECEDENTS

Before the turn of the century regulations attempting to restrict student associations had been imposed at both the college and high school levels. But as these regulations were challenged in court actions, they failed to hold up. When Purdue University authorities required withdrawal from all fraternities as a condition of admission, the Indiana Supreme Court declared the regulation invalid.[12] Again, a regulation of a Missouri school system forbidding student attendance at evening socials was looked upon with disfavor by the Missouri Supreme Court.[13] The cases did not expressly consider the constitutionality of the rules, but their thinking implicitly recognized the significance of the problem of State regulation of association. In the Purdue case, the court said:[14]

---

[11] More than half of the States have statutory regulation of high school fraternities. Although most of these statutes were enacted between 1900 and 1920, some are of recent vintage (e.g. Miss. Code Ann. §6486-01 [1962]).

[12] Stallard v. White, 82 Ind. 278 (1882). The court distinguished an Illinois decision, Pratt v. Wheaton College, 40 Ill. 186 (1866), which upheld a similar regulation on the grounds that the Wheaton College was a private institution and had a greater latitude for action. The court did endorse controls after admission to college, however.

[13] Dritt v. Snodgrass, 66 Mo. 286 (1877) (concurring opinion). See also, Hobbs v. Germany, 94 Miss. 469, 49 So. 515 (1909) (student can attend church at night).

> If mere membership in any of the so-called Greek fraternities may be treated as a disqualification for admission as a student in a public school then membership in any other secret or similar society may be converted into a like disqualification and in this way discriminations might be made against large classes of the inhabitants of the State, in utter disregard of the fundamental ideas upon which our whole educational system is based.

and three judges of the Missouri court argued:[15]

> If they (the school board) can prescribe a rule which denies to the parent the right to allow his child to attend a social gathering, except upon pain of expulsion from a school which the law gives him the right to attend, may they not prescribe a rule which would forbid the parent from allowing the child to attend a particular church, or any church at all, and thus step _in loco parentis_ and supercede entirely parental authority.

The _reducto ad absurdum_ approach-that if a school can forbid fraternities it also could forbid any assembly of students- is patently fallacious. However, the real value of these judicial statements is that the courts early recognized that schools should be forbidden a completely free hand in the regulation of student associations. They recognized that some student associations are protected, based either on inherent parental powers, or on the rights of the students themselves.

After the turn of the century, courts began to approve school regulation of student fraternities. Indeed, judicial opinion unanimously supported school authorities who deprived students of participation in athletic and other contests if they belonged to secret societies.[16] By 1912, courts had upheld not only bans on extra curricular activities, but permanent expulsion as punishment for fraternity membership.[17]

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[14] Stallard v. White, 82 Ind. 278, 287 (1882).

[15] Dritt v. Snodgrass, 66 Mo. 286, 297 (1877).

By 1915, the issue reached the Supreme Court. The case, Waugh v. Mississippi University,[18] considered a regulation of the University of Mississippi which forbade a student to affiliate with, attend meetings of, or "in anywise contribute any dues or donations to Greek letter fraternities." The plaintiff attacked the regulation by rather obscure allegations that it deprived him of "his property and property right, liberty and his harmless pursuit of happiness." The Court rejected this amorphous contention and upheld the regulation, saying that the University had reasonable grounds to conclude that membership in fraternities was inimical to the education process of the school, and *a fortiori*, the regulation was reasonable.[19]

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[16] Wayland v. Board of School Directors, 43 Wash. 441, 86 P. 642 (1906); Wilson v. Board of Education of Chicago, 233 Ill. 522, 84 N.E. 697 (1908); Favorite v. Board of Education of Chicago, 235 Ill. 314, 85 N.E. 402 (1908).

[17] Bradford v. Board of Education, 18 Cal. App. 19, 121 Pac. 929 (1912). Smith v. Board of Education of Oak Park, 182 Ill. App. 342 (1913). In neither case was there urged an argument based upon freedom of speech and association.

[18] 237 U. S. 589.

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[19] The following Michigan Statute reflects the early legislative antipathy towards secret societies. (Perhaps symptomatic of the wave of zenophobic nativism which characterized the early twentieth century in America.)

Chapter 33 of School Code
383.1 Unlawful in public schools.

Sec. 1. It shall be unlawful for any pupil of the elementary school and the high school of the public schools or any other public school of the State comprising for all of the 12 grades in any manner to organize, join, or belong to any high school fraternity, sorority, or any other secret society. A public school fraternity, sorority, or secret society, as contemplated by this act, is hereby defined to be any organization whose active membership is composed wholly or chiefly of pupils of the public schools of this state and perpetuating itself by taking in additional members from the pupils enrolled in the public schools on the basis of the decision of its members rather than upon the right of any pupil who is qualified by the rules of the school to be a member of and take part in any class or group exercises designated and classified according to sex, subjects required by the course of study, or program of school activities fostered and promoted by the school board and superintendent of schools for city and graded schools and by the school board and county commissioner of school for all schools and employing a superintendent of schools. Every such fraternity, sorority, and secret society as herein defined is declared an obstruction to education, inimical to the public welfare, and illegal.

383.2 Duty of School Board; Expulsion of Pupils.

Sec. 2. It shall be the duty of each school board to prohibit the organization or operation of such fraternity, sorority, or other secret society within the school system over which it has jurisdiction and it may suspend or expel from the school or schools under its control any and all pupils who shall be or remain members of, or, who shall join or promise to join, or shall become pledged to become members of, or who shall solicit any other person to join or be pledged to join, any public school fraternity, sorority, or secret society declared by Section 1 hereof to be illegal.

383.3 Credit, Promotion or Graduation of Violators Illegal

Sec. 3. It shall be illegal to give credit for a subject pursued, to promote from grade to grade or to graduate any person who shall beknowingly violate the provisions of this act, or having violated it shall persist in its violation. Any credit given contrary to the provisions hereof shall not be accepted by any other school or educational institution within this state.

One important feature stands out among all of these early decisions. There was no balancing the values of association against the legitimate State interests of discipline within the schools. The test was simply whether a regulation forbidding fraternities had any reasonable relationship to school discipline. Of course, the answer was yes. [20]

For the next thirty years jurists and school authorities maintained their all-or-nothing-at-all attitude towards high school fraternities. If a

---

383.4 Penalty

Sec. 4. Any school official or member of any school board or other person violating or knowingly permitting or consenting to any violation of the provisions of this act shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than 25 dollars nor more than 100 dollars for each offense.

[20]

> It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the State of Mississippi to determine. It is to be remembered that the University was established by the State and is under the control of the State, and the enactment of the statute may have been induced by the opinion that the membership in the prohibited societies divided the attention of the students and distracted from the singleness of purpose which the State desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity.
>
> 237 U. S. at 596-97

student insisted on belonging to a fraternity, he was expelled from school.[21] Permanent expulsion inexorably attached to continued membership despite proof that the school was in no way affected by the socity.

By 1945 the wind began to shift, at least as regards the attitudes of school authorities. Regulations softened towards fraternity membership. This change perhaps is owing to a realization that expulsion from school creates a misfit in an education-centered world. Or it may be caused by a reappraisal of the actual effects of fraternities on secondary school education.[22] At any rate, the rules have changed. Instead of expulsion, lesser deterrents are used, such as exclusion from extra curricular activities and athletics. Scholastic honors are withheld in some instances.[23]

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[21] Lee v. Hoffman, 182 Iowa 1216, 166 N.W. 565 (1918); Sutton v. Board of Education of City of Springfield, 306 Ill. 507, 138 N. E. 131 (1923); Antell v. Stokes, 287 Mass. 304, 191 N.E. 407 (1934); Hughes v. Caddo Parish School Board, 57 F.Supp. 508 (D.C. La. 1944), aff'd per curiam 323 U. S. 685 (1945); Satan Fraternity v. Board of Public Instruction, 156 Fla. 222, 22 So.2d 892 (1945); But see, Wright v. Board of Education of St. Louis, 295 Mo. 466, 246 S. W. 43 (1922) (holding as ultra vires a school board regulation barring fraternity members from all extra curricular activities, honors, and graduation exercises); Steele v. Sexton, 253 Mich. 32, 234 N. W. 436 (1931) (student not expelled but received no credit diploma).

[22] In one recent case it appeared that members of fraternities held a great number of leadership and scholastic honors. Holyroyd v. Eibling, 188 N. E. 2d 208 (Ohio Com. Pl. 1961). Nevertheless, the court, with ovine faithfulness to precedent, upheld a regulation discouraging membership in fraternities.

[23] Coggins v. Board of Education, 223 N. C. 763, 28 S. E. 2d 527 (1944); Wilson v. Abilene Independent School District, 190 S. W. 2d 406 (Tex. Civ. App. 1945); Isgrig v. Srygly, 210 Ark. 580, 197 S. W. 2d 39 (1946); Holroyd v. Eibling, 188 N. E. 2d 208 (Ohio Com. Pl. 1961).

In some educational institutions, fraternities and sororities are permitted, but limited to intramural affiliations-interschool or national affiliations only are forbidden. 24/

The significance of recent developments in fraternity regulations is a constitutional one. The growing awareness of student social rights and similar awareness of the destructive effects of expulsion from school may have adjusted the constitutional balance between freedom of association and the discipline in the schools. No longer is there any justification to completely forbid any kind of fraternity on pain of expulsion from school. School systems have come up with rules that assure school discipline, while being a lesser encroachment on associational liberties than the earlier all-or-nothing-at-all regulations.

Several things appear clear in summation. One is that the courts have always upheld the constitutionality of regulations governing education-connected fraternities. Another is that there has been a tempering of the former strict exclusionary rules. From these two factors one can extrapolate that some regulation of high school societies is clearly permissible under the U. S. Constitution, but that contemporary American society values some degree of associational freedom. Thus, a rule banning all societies under penalty of expulsion probably would be too great an impairment of the freedom to assemble.

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[24] Burkitt v. School Dist. No. 1, Multnomah County, 195 Ore. 412, 246 P. 2d 566 (1952); Webb v. State University of New York, 125 F.Supp. 910 (N.D.N.Y. 1959), app. dism. 348 U. S. 867 (1954).

CHAPTER III

CRIME INVESTIGATION IN THE SCHOOL: ITS CONSTITUTIONAL DIMENSIONS

> The school is not a court of law. The private personal effects of an individual are regarded as being inviolate. We regard the school as not having the right to search.
>
> [Affton, Missouri]

School personnel are not policemen. Nevertheless the school is often forced to play this role. Reports of the presence of dangerous weapons, pornography, liquor, stolen goods, and dozens of other undesirable, if not very harmful, objects are familiar to every secondary school teacher and administrator. Additionally, theft or other illegal acts committed during the school day often demand immediate and effective action by school authorities. Still again, the police may ask a school principal to assist them in the questioning, or search of the person or effects of a student.

Coursing through the foregoing examples is the question of what posture should the school take toward investigations? Should it assume the same posture in all cases? Should it act to defend the student against police interrogation in all instances? Are there times when the school should take the initiative in an investigation? Furthermore, what rights does a student have? Does he have the right to refuse a search of his person or his locker? Must he answer all questions? If a student refuses to cooperate, may the school punish him?

By citing only a few of the basic issues, the total complexity of criminal investigation in the schools comes to the surface. On one side stands the societal interest in the detection of crime, and particularly, the interest of the school in protecting the student body from dangerous persons and weapons. On the other side stand the rights of young adults, such as the right of privacy and the privilege against self-incrimination.

Between the polestars rest the ambivalent duties of school personnel. School officials are said to be in loco parentis to each student. [1] Consequently, they may have a duty to each student to advise him of his rights and protect him against over zealous police investigation. Alternatively, school officials are in loco parentis to other students in their charge, and must protect them against dangers posed by a particular law breaking student. With the dilemma thus posed, we can now pass to particulars.

I. SEARCHES OF STUDENTS AND LOCKERS

> Students are forbidden to bring some things into the school. Search of the person and his effects is a normal procedure in enforcement of these rules. Water pistols, fire-crackers, itch-powder and similar items are confiscated.
>
> [Mercer County, West Virginia]

A. Searching the Person of Students

> We do not hesitate to go through their wallets, purses, handbags, notebooks, etc. With the girls, it gets a little tricky when it comes to their clothing. However, with boys, we don't hesitate to check their pockets.
>
> [Casper, Wyoming]

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[1] Actually the phrase in loco parentis expresses nothing save that the school has certain rights and duties to children in its care. When a court rules that a certain act by a school official is performed in loco parentis the court is actually concluding that the act was permissible. When a court rules that an official superseded his powers in loco parentis, the court is ruling that the specific act was not legally permissible. Most simply, the phrase in loco parentis is no guide to action, but solely a conclusionary label attached to permissible school controls. The phrase is so used here.

The Fourth Amendment to the United States Constitution as applied to the States by the Fourteenth Amendment[2] provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .

The amendment does not define what is a search, nor does it set out what is an unreasonable search. This was left to the courts to develop. In constructing the definition of a search the courts have interpreted history as modified by the inventions and demands of an advancing society. In the twentieth century a search is an action[3] by a public official[4] compelling[5] the production of non-verbal material or information from the possession of another against his will. A crucial point is that a teacher need not forage through the clothes of a student. A search is made if the teacher compels the student to produce or at least expose matter otherwise covered from the plain view of the teacher.[6] Consequently, ordering a student to empty his pockets, remove his coat or shoes, or empty his mouth, is a search regardless whether the student is physically handled in the process.[7]

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[2] See Ker v. California, 374 U. S. 23 (1963).

[3] Lopez v. U. S., 373 U. S. 427 (1963); On Lee v. U. S., 343 U. S. 747 (1951). A Federal agent, posing as petitioner's friend, engaged in conversation in petitioner's store with a radio transmitter concealed on the agent's person. Incriminating statements made by the petitioner were transmitted outside the store to another Federal agent. Later these were introduced in evidence against the petitioner. The court held that the conduct of these agents did not amount to search. The court compared such an act to the use of bifocals, field glasses, or telescopes. Vision, even with mechanical aids, is not a forbidden search, even if focused without knowledge or consent of the person under scrutiny, unless there is a physical invasion of a constitutionally protected area.

[4] Annenberg v. Roberts, 333 Pa. 203, 2 A. 2d 612 (1938). A legislative committee demanded certain persons produce incriminating evidence concerning gambling operations. The court held that a witness cannot be compelled, under the guise of a legislative study of conditions bearing upon proposed legislation, to reveal his private and personal affairs, except to the extent to which such disclosure is reasonably required for the general purpose of the inquiry. To compel an individual to produce evidence, under penalties if he refuses, is in effect a search and seizure and unless confined to proper limits, violates his constitutional rights.

[5] See Hoppes v. State, 70 Okla. Cr. 179, 105 P. 2d 433 (1940), stating that a search implies an invasion and quest, with some sort of force, either actual or constructive. A search, within constitutional immunity from unreasonable search and seizure, implies a quest by an officer of the law acting on the things themselves, which quest may be secret, instrusive, or accomplished by force.

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[6] Bone v. State, 207 Miss. 868, 43 So. 2d 571 (1949). A law enforcement officer, after being informed that a strange car was parked on a street walked to the car and looked in it without having a search warrant. Inside the car he saw an unusual blanket. Defendant was arrested for a burglary and claimed that his car had never entered the town where the crime was committed. The defendant claimed that the law enforcement officer could not testify that he had seen the car because his acts constituted an unreasonable search. The court held that obtaining information by means of the eye, where no trespass has been committed, does not constitute an unlawful search. "The eye doesn't trespass."

[7] School authorities are generally unaware that a search may be conducted without a physical touching. For example, an Illinois school administrator reports:

> The school district does not have a policy statement relative to searching a person. However, it could be considered common practice for a Principal to request that a child empty his pockets or pocketbook in his presence. This action would be preceded by evidence that the child is carrying prohibited items on his person, such as a pocket knife, matches, lipstick, etc.

An administrator from another State gave a more soul searching, but equally uninformed reply:

> There might be a question of our legal rights, however, we have asked students to show the contents of their pockets, purses, lockers, and even shoes and socks when staff members have been definitely tipped off that certain contraband might be found. To date with 4700 pupils in the district I personally have never had a student refuse to show his effects to me or a staff member when so asked and we have had several cases of stolen articles being recovered with this method.

Another aspect of the law of search and seizure is that a person may cooperate with a search and thereby waive his rights. Cooperate in this sense does not mean to merely accede to a requested search, but to affirmatively volunteer material. For example, if a student responded to an order to empty his pockets, his action would probably not constitute a waiver of his rights to be secure from a search. The age of the student, and his subordinate position vis-a-vis school authorities would appear to give rise to a presumption of non-waiver in such a situation. 8/ To rebut this presumption there should be clear and convincing proof that the student willingly acceded to the investigation.

The Fourteenth Amendment does not forbid all searches but only unreasonable searches. The definition of an unreasonable search is, like most definitions, easier to state than to apply. Basically the only time a person may be searched is pursuant to a valid search warrant, or incident to a valid arrest. Only one of these alternatives is open to school officials-the valid arrest opportunity. (The search warrant will probably always be executed by police officers.) Consequently, the main question facing schoolmen, if they act in their capacity as private citizens, is when may they arrest a student? A citizen, if he has reasonable grounds to believe a person has or is committing a felony, and a felony has in fact been committed,

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[8] See Haley v. Ohio, 332 U. S. 596 (1948) (Confession of fifteen-year-old boy held to be involuntarily given); Gallegos v. Colorado, 370 U. S. 49 (1962) (Confession of fourteen-year-old boy held to be involuntary)

may arrest the suspected felon.[9] He may not arrest if the crime committed is a misdemeanor except when the misdemeanor is a breach of the peace, or petit larceny committed in his presence. [10] For example, if a major theft had in fact been committed on school grounds, all students could not be searched by the school authorities. But if one particular student has been seen in the room where the theft occurred, there may be reasonable grounds to arrest that student and then search his person.[11]

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[9] The general rule is that an arrest is justified when a felony has in fact been committed by someone, but the person arrested need not be guilty. Suell v. Derricott, 161 Ala. 259, 49 So. 895 (1909). In Imler v. Yeager, 245 S.W. 200 (Mo. 1922) the court stated:

> When a felony had been committed any private person may, without a warrant, arrest one whom he has reasonable grounds to suspect of having committed it, but such an arrest is illegal if no felony has in fact been committed by anyone, though if a felony has actually been committed, such an arrest is legal, though the party suspected and arrested is innocent.

Several variations of these general rules have been adopted by the different States. The most stringent is that an arrest is justified only if person arrested in fact committed the felony with which charged. Pandjiris v. Hartman, 196 Mo. 539, 94 S.W. 270 (1906).

The liberal view, recognized in a minority of jurisdiction, holds that an arrest is justified if made upon reasonable grounds. Alder v. Commonwealth, 277 Ky. 136, 125 S.W. 2d 986 (1939); Burton v. McNeill, 196 S.C. 250, 13 S.E. 2d 10 (1941).

[10] See generally, Alexander, The Law of Arrest in Criminal and Other Proceedings (1949).

[11] A good faith requirement is necessary to provide protection against pedophiliacs and similar sexually deviate personnel. If a search of physical intrusion is perpetrated to satisfy abnormal desires then such search may be an invasion of the personal privacy protected by the Fourteenth Amendment. See York v. Story, 324 F. 2d 450 (9th Cir. 1963). (Policemen demanded woman to strip and took pictures of her over her objections; held to be violation of the constitutional rights of privacy).

The foregoing discussion points up the rights of school personnel acting as private citizens to arrest and search students. Do school officials have added investigative powers because of their special relationship to students? The answer is a very qualified yes. The qualifications break down into considerations of the age of the student searched, the object of the search and the manner of the search.

B. Searches of Young Students

> . . . In another case, a student had taken a purse and forged checks from a check book in that purse. The student was asked, "May I see your purse?" The student handed the purse over, the one being sought.
>
> [Name of School District Withheld]

A school may search the persons of young school children providing the search is in good faith for a school purpose.[12] Searches of this nature may be justified on several grounds. A principle basis is implied parental consent, positing that parents delegate to the school certain parental rights over the child while the child is in the custody of the school. The dimensions of the delegated rights are greatest at the lower age levels and at these would seem to include the right to search. Another reason tending to support searches of elementary school children is that the school owes a duty to all children within its custody, and implicit in this duty is the power to protect children from other children. Consequently, if the purpose of this search is to uncover objects dangerous to children, the search is permissible. A third, and negative, basis supporting the right to search children in the elementary schools is that the children have not reached the age of criminal responsibility, thus placing the search beyond the spirit of the constitutional safeguard against unreasonable searches and seizures.13/

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[12] Indeed the teacher may have a duty to search in situations where the child of tender years is suspected of having articles dangerous to himself and others. See Christofides v. Hellenic East Orthodox Christian Church, 33 Misc. 2d 741, 227 N.Y.S. 2d 946 (1962) (knife with three-inch blade per se a dangerous instrumentality in the hands of a child). Cf. Lilienthal v. San Leandro Unified School District, 193 Cal.App. 2d 453, 293 P. 2d 889 (1956).

C. Searches of Older Students

> If it is necessary to search students then it should be done--the coach is the logical man for the boys and the dean of women or girls' counsel for the girls. It should be noted clearly what they are searching for and what has happened to make the search necessary. The innocent have to suffer with the guilty until the culprit is found and then he should be punished. Students know each other better than the teachers and they can put their hands on the culprit right off . . . take them to the gym and explain the situation and send them out to find the missing article before they can go home. It won't take long for something to turn up.
>
> [Hillrose, Colorado]

When children reach the age of criminal responsibility, they receive certain constitutional safeguards. They are adults insofar as the criminal law is concerned, and consequently, they are adults insofar as they are entitled to due process of law guaranteed by the Fourteenth Amendment. And implicit in due process of law is the guarantee against unreasonable searches and seizures.

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[13] Similarly a child's constitutional right of privacy may not develop (save for purposes set out in the previous footnote) until the child is at an age to feel mortification or embarrassment. Cf. One 1958 Plymouth Sedan v. Pennsylvania, 380 U. S. 693 (1965).

What does this mean for school officials? It simply means that they cannot search the persons of older students, unless they arrest a student pursuant to the power of a citizen to arrest persons generally.[14]

Other avenues are open to school officials. If a dangerous weapon is reported or suspected to be in the school, the principal can request suspected students to submit voluntarily to a search. The students who refuse to be searched may be then sent home or otherwise isolated from the student body.[15] The reason for special treatment is not that the non-consenting students are being punished for exercising their rights, but that the school is justified in isolating them because it cannot be certain that they do not possess a dangerous object which the school has reason to believe is on the premises.

At this point the school authorities must decide whether or not they want to search the isolated students. If they do search, they will probably surrender the right to use any evidence so procured as a basis to punish the offending student. Alternatively, the police may be called and a search warrant executed. Evidence procured by this procedure may be used as a basis for punishment, both at school or in the juvenile or criminal courts.

One theory may sustain searches of individual students suspected of possessing forbidden articles. It is to analogize the administrative arrests of deportation proceedings to administrative arrests for expulsion from school. In Abel v. U.S., [16] the Supreme Court upheld a search of the person and room of an alien taken into custody preliminary to a deportation proceeding. A principal point in the analogy is that the arrest in the Abel case occurred as a result of the failure of the alien to register pursuant to Federal law. In the school situation the student must have clearly violated a regulation. This theory will not justify a fishing expedition or general shakedown of students. However, it does support a search of a student incident to taking him into custody for the purposes of suspension or other severe punishment.

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[14] The safest procedure for the school official is not to arrest the suspected student but to call the police and let them decide whether to arrest the student or not. This procedure will insulate school personnel against a lawsuit for false arrest.

[15] It is not unlikely that further interrogation of the isolated students will bring forth the offending party.

D. Consequences of an Unconstitutional Search

> Sometimes it is necessary to search students for stolen property. Also for knives or other weapons which are considered dangerous and which are prohibited by law.
> [Riverton, Wyoming]

Now to go one step further. What happens if a school official does conduct an illegal search?

teacher liability

As regards a teacher's personal liability, he may be liable for damages under State and Federal laws for a tortious violation of the privacy of the student. In most cases the student will have suffered little or no damages. However, adverse publicity and the expense of a lawsuit precipitated by an indignant parent are secondary but often costly factors. Moreover the conduct may be cause for dismissal of the teacher.

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[16] 362 U. S. 217 (1960). Even here, however, there was an administrative warrant issued, indicating at least a minimum of formal protection.

suppression of the evidence

Evidence or contraband produced by an unconstitutional search may not be used in a State or Federal criminal proceeding against the student. Moreover, any evidence or information gained through the use of illegally obtained materials is also inadmissible in criminal proceedings. A kind of original sin pervades all subsequent uses of the illegally procured goods. (For example, if the student confessed when confronted by this evidence, his confession would be invalid.) An unconstitutional search in effect may very well prevent a successful criminal prosecution of the person searched.

If the fruits of an illegal search and seizure are inadmissible in a criminal proceeding, are they likewise inadmissible in a proceeding by the school to expel or otherwise punish a student? No court has decided this question but both logic and experience appear to support an exclusionary rule.

For decades the Supreme Court permitted the use of illegally procured evidence in State criminal cases on the theory that a criminal should not go free because the constable bungled. The feeling was that the criminal's wrong should not go unpunished because of the State officer's wrong. The wrong to the criminal could be righted because he could bring a damage suit against the offending official. As dubious as the criminal's relief appears when stated, it was even shallower in practice. Damage suits by convicted criminals against State officers were few and rarely successful. Illegal searches became planned invasions of privacy and not the bungling of constables. In short there was no real protection against unconstitutional searches. In 1961 the Supreme Court of the United States decided that evidence procured from an unreasonable search and seizure must be excluded from State criminal prosecutions. [17] In so holding the Court commented: [18]

> Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable, at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled and, to the courts, that judicial integrity so necessary in the true administration of justice.

The problem for school administrators thus becomes clear. Is a school disciplinary procedure, such as expulsion or suspension, the analogue of a criminal procedure for the purposes of excluding evidence procured by invading a student's privacy? The author believes it is and that the evidence cannot be used against a student.[19]

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[17] Mapp v. Ohio, 367 U.S. 643 (1961). The court overruled Wolf v. Colorado, 336 U.S. 25 (1949), a decision decided just twelve years before.

[18] Id. at 660.

The only reported case on the issue arose in Tennessee. There a boy broke a school regulation by entering a classroom during recess. When accused, he falsely denied so doing. He was punished for lying and breaking the school regulations. A dime was reported missing from the room and the teacher searched the boy (the court's written opinion does not say whether the dime was found). The parents of the child sued the teacher, seeking to recover money damages for an illegal search. The Supreme Court of Tennessee upheld the teacher on the grounds that the teacher's motive in searching the boy was to clear him of any suspicion, and thus the teacher acted for the child's welfare.[20] A previous Tennessee case decided that a teacher who had searched a young girl, because the teacher had lost twenty-one dollars, could be held liable in damages to the girl.[21] The court distinguished the earlier case on the basis that the search there was for the teacher's benefit, and not conducted for the child's welfare.[22]

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[19] In Weeks v. United States the Supreme Court said:

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of a crime or not, and the duty of giving it force and effect is obligatory upon all entrusted under our Federal System with the enforcement of the laws. [Emphasis added] 232 U.S. 383, 391 (1914).

Although this case was a decision concerning Federal officials, the decision in Mapp v. Ohio, 367 U.S. 643 (1961), seems to bring the State exclusionary policies up to the strictness of the Federal policies. Cf. Lassoff v. Gray, 207 F.Supp. 843 (W.D.Ky. 1962) (Evidence for tax assessment procured by invasion of taxpayer's privacy excluded from civil action by government tax office). See also Rogers v. U.S., 97 F.2d 691 (1st Cir., 1938); Schenck v. Ward 24 F.Supp. 776 (D.C.Mass. 1938); one Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) (Applied the exclusionary rule to a forfeiture proceedings in relation to an automobile allegedly used to carry contraband).

Perhaps some constitutional line drawing should be here. Is it inconsistent to rule that a teacher who searches a student for the welfare of the student or other students cannot be held liable in damages, and also to rule that anything uncovered may not be used as a basis for punishing the student? For example, a report of dangerous weapons in the school may justify a general shakedown of all students. Is it contradictory to hold the school personnel safe from suit, but also forbid any articles found to form a basis for disciplinary action?

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[20] Marlar v. Bill, 181 Tenn. 100, 178 S.W. 2d 634 (1944).

[21] Phillips v. Johns, 12 Tenn. App. 354.

[22] Based on these two Tennessee cases cited in notes 20 and 21 supra, and the fact that the Kentucky Court of Appeals in numerous cases has held that teachers and officials of public schools stand in loco parentis with respect to pupils the Kentucky Office of the Attorney General rendered this opinion on the law of Kentucky:

> [A] school teacher may search a pupil's pockets or purse and confiscate such articles as cigarette lighters, pocket knives, or key chains with cigarette lighters attached if the teacher acts with reasonable judgment and for good cause, without malice and for the welfare of the child, as well as the school. However, the pupil's parents should be advised of this action and the confiscated articles turned over to said parents. If the pupil is guilty of subsequent offenses of this nature, the teacher might be empowered to retain the articles confiscated until the close of the school year.

In balancing a particular student's rights of privacy against the rights of the school to protect him against himself, and other students against him, this may well be the solution.[23] School officials may, under this theory, be said to be acting in loco parentis. Conversely if the search may be used to expel or suspend the student, then the search can hardly be denominated in loco parentis, or for the child's welfare.

E. Searching School Lockers

> [W]e consider this [locker inspection] a general part of the whole disciplinary situation and we would hate to see a situation where the locker was considered "private" and we did not have access.
>
> [Rehobeth Beach, Delaware]

The search of student lockers within the school poses many problems not presented in the analysis of searches of the person. Basic to the question is whether a locker is an area protected from a search. Another issue is whether the nature of the locker contract with a student, i.e., whether it is a lease or merely a courtesy or privilege granted to a student. The question is further complicated because there are no cases specifically on this issue.

lockers as a protected area

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects." The amendment was drafted and enacted in the eighteenth century, when a person's papers and private possessions were kept almost exclusively in his home. But the agrarian's concept of privacy, the home, has passed.

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[23] See Frank v. Maryland, 359 U.S. 360 (1959). (Community health protection weighed against compulsory inspection of a person's home.)

In the twentieth century personal effects are kept in many places outside the home. Automobiles, safe deposit boxes, desks, business safes, and industrial lockers are used to hold important documents and articles. Hotel rooms replace the home for a large number of our citizens. As a result, modern life has demanded and received a new physical dimension of constitutionally protected privacy.

The restrictive characteristics of the Fourth Amendment phrase ". . . secure in their persons, houses, papers, and effects," have been stripped of their proprietary implications. No longer must a citizen own, or rent, a home to be protected from an invasion of his privacy.[24] Consequently, whether a student rents or owns a locker is not crucial to its sanctity. A most significant decision by the Court was handed down in 1964 holding that automobiles were protected areas.[25] This decision extends the homes and persons phrase to mean all closed compartments (even if they are on a public street). The tenre of this decision would support the conclusion that lockers, even though in a public school, may be constitutionally protected compartments. Thus, by using bits and pieces of Supreme Court decisions, a good argument can be made that school lockers are areas of constitutionally protected privacy. Moreover, several decisions in lower Federal courts lend even greater support to this conclusion.

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[24] Hotel rooms are protected despite the duration of a persons stay. Stoner v. California, 376 U.S. 473 (1964).

[25] Preston v. United States, 376 U.S. 364 (1964). Actually the point was not even seriously urged by counsel for the government. Cf. Carroll v. United States, 267 U.S. 132 (1925); Brinegar v. United States, 338 U.S. 160 (1949).

The closest reported court decision to the issue of whether or not a school may search a student's locker is United States v. Blok,[26] a 1950 District of Columbia case. There a Federal employee was suspected of committing petit larceny. The police asked and received permission from her superiors to search her desk, in which they found incriminating evidence. The Federal Court of Appeals held that even though the government owned the desk and could have gone into it for property needed for official use, the government could not go into the desk seeking evidence of an employee's crime.[27] Other lower court cases, although not as analogous as the Blok case, militate to the same

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26. 188 F. 2d 1019 (D. C. Cir. 1951).

27. In Freeman v. U.S., 201 A. 2d 22 (D. C. Mun. App. 1964) a government messenger argued that a table from which he was assigned his messages and routes could not be searched by government agents. The court held the employee's interest in the table insufficient, stating:

> Here appellant did not have the exclusive right to use the table at the messenger station on the seventh floor. His assignment there was merely temporary since he could be reassigned to another floor on a daily basis. While he could place personal effects in the table drawer, there was another assigned place in the building for his clothing and lunches. The minimal time spent working at the table and the fact that secretaries and other employees would frequent the room and use paper clips or pencils from the table drawer gave appellant a very limited interest therein. In effect the table was open for common use by other employees of the agency. For these reasons we feel appellant cannot complain that the search by the Veterans Administration investigator violated his right of privacy under the Fourth Amendment and that the seized evidence should have been suppressed. Id. at 24.

end. In Holzhey v. United States,[28] another government employee was suspected of stealing government property. Federal agents went to the home of the employee's married daughter and secured the daughter's consent to search her garage in which a locked cabinet owned by the employee was stored. The agents searched the cabinet and uncovered incriminating evidence. The Federal Circuit Court of Appeals held that the search was unconstitutional and that even though the daughter owned the garage, she could not authorize a search of the locked personal effects of her mother contained in the garage.

There are several other cases further from the point but sufficiently relevant to merit mention. Foremost of these is the situation where a serviceman's locker is searched. The courts have held that these lockers can be searched, but only where permission is granted by a superior officer.[29] By necessary implication the judicial reasoning is that the lockers are private, but because of the unique character of a serviceman's position, his officers can also consent to a search.[30] National security, our country's greatest interest, presumably justifies this encroachment on individual rights. The Court Martial process supplies another example of a sacrifice of individual protections to the national interest. The right of privacy was also recognized in a case where police officers hid themselves in a restroom of an amusement park open to the public. The California Supreme Court held that despite the fact that the park owner gave his permission to the officers and that the restrooms were open to the public, eavesdropping in a lavatory violated a fundamental right of privacy.[31]

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[28] 223 F.2d 823 (5th Cir. 1955). See also Reeves v. Warden, 226 F. Supp. 953 (D.C.Md. 1964) (Mother of suspected rapist could not consent to search of son's room even though she owned the home and had free access to the room.)

[29] Richardson v. Zuppann, 81 F.Supp. 809 (N.D.Pa. 1949) (Locked strongbox found in U.S. government office in Trieste, Italy could be searched when owned by person in the military service.)

[30] People v. Shepard, 212 Cal.App.2d 297, 28 Cal.Rptr. 297 (1963).

The only case opposing the mainstream toward greater protection of privacy was decided by the highest court of West Virginia in 1958.[32] There it was decided that a search of a locker in a bus station was constitutional even though the suspected criminal leased the locker, and had a key thereto. The court stated that the locker simply was not a place protected from searches by the Federal Constitution. The only comment which can be made on this case has been made,--that it is an anomoly in current concepts of protected possessions.[33] It would probably not be upheld by the Supreme Court.

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[31] Bulocki v. Superior Court of Los Angeles, 21 Cal.Rptr. 552, 371 P. 2d 288 (1962). But see U.S. v. Lewis, 227 F.Supp. 433 (S.D.N.Y. 1964); People v. Rodriquez, 4 Cal. Rptr. 456 (1960); McDonald v. U.S., 335 U.S. 451 (1948).

[32] State v. Bruner, 143 W. Va. 755, 105 S.E. 2d 140 (1958), cert. denied, 358 U.S. 937 (1959).

[33] The Court of Appeals of New York decided that a safe deposit box was not protected against a sheriff's inspection for purposes of executing a lien on the contents. Carples v. Cumberland Coal & Iron Co., 240 N.Y. 187, 148 N.E. 185 (1925). Although the purpose of the inspection was not to find evidence of a crime, the court went out of its way to comment on the constitutional aspects of the sheriff's acts, stating:

> We are unable to see any pertinent analogy between a man's home which is protected by the Constitution and decisions from invasion for the purpose of serving civil process, and a disconnected depository in which he has stored his property, whether a barn, a warehouse, or a safe deposit box. 148 N.E. 185, 187.

consent of the student to a search of the locker

A student may consent to a search of his locker and thereby legalize what would otherwise be an illegal search.[34] The consent must be freely and knowingly given, however.[35] Because a voluntary and intelligent waiver is necessary to validate the search, there may be a duty upon the school principal or police officers to tell the student that he has a right to object to a search of his locker.[36] Owing to the age and education of the student, and the possible intimidating presence of police officers, express advisement of his rights would seem necessary to show an exercise of a voluntary choice by the student.[37]

The interests of the school may best be promoted by a preventive procedure adopted at the beginning of the school year, when lockers are originally assigned. The process is not complicated. The school need only to have each student sign a statement to the effect that the school may, at any time and for any purpose, open and inspect the locker of the student.[38] Conceptually this agreement would not be a waiver of a student's right of privacy.[39] However, it would change the character of a school locker from a private compartment to one open to the school and its officers.[40]

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[34] Johnson v. U.S., 333 U.S. 10 (1948) (the fact that police officers are admitted to an apartment upon request does not constitute consent to a search of the apartment).

[35] A West Virginia school administrator reports a unique device for obtaining consent:

> The principal has a master-key for all locks, and at times has investigated suspicious happenings around the school, but in most cases we ask pupils to see their lock under one pretense or another.

[36] Johnson v. Zerbst, 304 U.S. 458 (1938) (the right to counsel in Federal courts places a duty on Federal judges to advise an accused of his rights).

[37] See cases cited note 8 *supra*.

Actually many schools retain a master key, or combinations, to lockers. This fact, coupled with a tradition of locker inspection or searches may well be an implicit condition upon the right to use the locker. In fact, schools may well have a right to inspect lockers for existing conditions threatening the health of the student body.[41] On the other hand, a right to inspect for unhealthy conditions does not extend to the right to inspect for contraband. The former right is a limited one.[42]

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[38] In People v. Kelly, 195 Cal.App. 2d 669, 16 Cal.Reptr. 177 (1961), it was held that a student who consented to inspection of his room during "emergencies" thereby consented to a search for stolen property. Limiting the stipulated reason for search to "emergencies," "health inspections," or "periodic inspections" may at least cause friction in the event of an investigative search. A preferable stipulation would be "at any time for any purpose deemed to be in the best interests of the school."

[39] An Iowa school reports:

> Whether or not a school retains the right to inspect lockers as a part of a locker-lease agreement is dependent upon the policies, rules and regulations of the respective boards of education. The State of Iowa has no regulations concerning this. The office of the Iowa Attorney General has advised the Department of Public Instruction that there does not seem to be too much doubt that school authorities could go as far as searching a person's locker. There is the possibility that a student may raise a personal right in connection with the searching of a locker. It may be necessary for a student to consent to the search of his locker.

[40] This distinction is important. A school system cannot compel a student to surrender his constitutional rights for the privilege of attending school. West Virginia State Board of Education v. Barnett, 319 U.S. 624 (1943). Consequently, if the school exacted a waiver of rights as a condition of attendance it would be violating the Constitution. For this reason, the locker agreement must be construed as changing the character of the locker area, and not as exacting waivers of privacy from students.

F. Conclusion

Current locker inspection policies are inadequate to promote the total interests of the schools. Although the schools probably possess the right to inspect lockers for substances endangering the health of the student body, their powers end there. The presence of stolen property, stolen from the school or otherwise, cannot be an object of a locker search. The reason for this is not that the school has made lockers the repositories for all kinds of contraband. The reason is that the schools have failed to clarify their locker policy and in the absence of a published policy clearly reserving the right to inspect the contents of school lockers for any purpose, the lockers would probably be held constitutionally secure against searches for contraband. Consequently, responsible school administration should draft and publicize a clarified locker policy reserving the greatest freedom of action to school authorities.

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[41] Frank v. Maryland, 359 U.S. 360 (1959), which did allow a fine of $20 to be imposed on a person who refused a health inspector admission to his home, may well support searches of lockers made to discover unhealthy or dangerous articles. The decision, however, must be limited to the purpose of the search and the crucial point that the searched individual could only be required to remedy unhealthy conditions uncovered by the search. No punishment was exacted. Cf. People ex rel Eaton v. Price, 364 U.S. 263 (1960).

[42] This limited-right-of-inspection distinction is made clearly by the Supreme Court cases involving searches of rented rooms to which landlords had retained a right to enter for cleaning or inspection purposes. The Court held that the landlords' rights of entry did not include the right to enter for purposes of crime investigation. Lustig v. U.S., 338 U.S. 74 (1949); U.S. v. Jeffers, 342 U.S. 48 (1951); Stoner v. State of California, 376 U.S. 473 (1964). See also Eng Fung Jem v. U.S., 281 F.2d 803 (9th Cir. 1960); Klee v. U.S., 53 F.2d 58 (9th Cir. 1931). Cf. Chapman v. United States, 365 U.S. 610 (1961).

II. POLICE INTERROGATION OF STUDENTS

> We request them [the police] to question the students at home. If they insist on questioning them at school either the principal or counselor is present in the room at the time of the questioning.
>
> This is a real problem. I would certainly like to know what our legal responsibility is in a case of this kind.
>
> In several cases they [the police] have demanded the right to question students at school. Is this legal?
>
> [Name of School District Withheld]

The police enter the school and ask to talk with a student suspected to have committed a serious crime. What are the duties of the school principal as a citizen promoting law enforcement? Are these duties superior to an administrator's duties in loco parentis to the student? And specifically, does the U. S. Constitution demand that the school principal act as a protector, or counsel, to the child?

A. Investigory Interrogation

> This is a ticklish area. As citizens, we, the teachers and administrators, have a responsibility to society, to see that lawbreakers are punished. As guardian of these students we must protect their rights.
>
> [Name of School District Withheld]

The investigation of a suspected crime must start somewhere. When police officiers ask to talk to the entire student body, or a large group of students, they generally have not reached the accusatorial stage of investigation. In other words, they have no definite suspects whom they would have an inclination or indeed the grounds to arrest. In such a situation it appears that a school official has the right under State and Federal law to allow the police to address the group and even indulge in some exploratory questioning of particular students.[43] A reasonable parent would probably consent to exploratory questioning of his child by police. Consequently, the school will not be going beyond the bounds of its in loco parentis role, much less its constitutional duty.

B. Accusatory Interrogation

> The school should cooperate with the Police Department and the Police Department should cooperate with the school. You are going to have tough characters in school and they have to be handled with a firm hand. School is a place for work and it is not to house loafers, or a meeting place to plan night activities.
>
> [Hillrose, Colorado]

Exploratory questionings of students do not occur as frequently as accusatory investigations. Police personnel generally exercise a professional restraint by not using the school as an investigatory forum for juvenile crime. But in some instances it is necessary for police to question students during school hours and on the school premises. These are the times when police suspect a particular student of a crime. In this instance, it appears that the police, representing the public interest in the prompt apprehension of criminals, are justified in requesting an interview with the suspected student.[44]

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[43] This is not to say that the school must permit police to question or address the student body. The school certainly may refuse to provide a forum for criminal investigation by police, especially when it is merely a fishing expedition.

At this point there comes in to play the delicate interaction of the school administrator's duties to the student, both in loco parentis and constitutional, and his citizenship responsibilities toward the effective apprehension of criminals. This conflict is caused by the recent decision of the United States Supreme Court in Escobedo v. Illinois.[45] There the Court decided that when[46]

> . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied the assistance of counsel in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment. . . .

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[44] The Pennsylvania Department of Public Instruction recommends:

Whenever possible, police officers assigned by police administrators to investigations involving interviews of pupils during school hours should wear civilian clothes and operate with unmarked vehicles. When a specially trained juvenile officer is available, he should be assigned to such investigation. Guide for Cooperation between School Officials and Police, p. 1 (1962).

This procedure protects the student and the school from inference of illegal conduct which may be drawn by village busy bodies.

[45] 478 U.S. 478 (1964).

[46] Id. at 490-491.

Shaving off the inappropriate qualifications,[47] the case as applied to the schools and the police means that there is an affirmative duty on someone to insulate the suspected student against self-incrimination, advise him of his rights to counsel and be sure that these rights are respected. And this duty may very well be on the school executive.

The school official who cooperates with the police by turning the student over to them becomes a party to the whole questioning process. May the school official rely upon the police to advise the student of his rights? Of course, if the police do, the schoolman is absolved, but if they do not, doesn't the schoolman as an instrumental party, indeed the initiator of the process, share the guilt for the breach of responsibility to the accused student? He probably does.[48]

Alternatively, school officials may fulfill their constitutional commitments in several ways. The safest constitutionally, but the most frictional, is simply to refuse the police the opportunity to question the student. This places a choice on the police either to arrest the student or leave the school, and the choice is difficult, because if they arrest the student without having sufficient grounds therefor, they may be liable for damages in a subsequent civil suit by the student.

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[47] The phrase "taken into police custody" probably means forceably detained or constrained. Whether this is done in the principal's office, the police car outside, or the police station should not matter. The compelled presence of the student is the crucial event, not the place of compulsion. Additionally, the fact that a teenage suspect has not requested an attorney hardly militates to the conclusion that he has waived the right to counsel. Probably only an adult, experienced in the judicial process and clearly aware of his rights, may be adjudged to have waived counsel by failure to request assistance. Johnson v. Zerbst, 304 U.S. 458 (1938).

[48] A school administrator from one State takes a rather naive and casual attitude toward this matter.

> Normally students are picked up by the police and taken to the station for questioning. Their interrogation methods are not entirely known, but it is believed that they exercise due care.

Another path may be taken by the principal. He may, after securing the student's permission, allow the police to question the student in his presence. If the student does not consent to police questioning in the presence of the principal, the principal's constitutional responsibilities are not over. He must at least advise the student of an absolute right to remain silent. Additionally, he should make clear that he is in the room on behalf of the student and not to aid the police. The principal should not question the student because such questioning would imply that the principal was not acting on the student's behalf but on the side of the police.[49] Futhermore, the principal should not attempt to counsel the student as regards what questions to answer and what questions to refuse to answer. The reason is that the principal is not a lawyer and when he so acts he is in effect volunteering legal services for which he has had no training. He simply jeopardizes the student. Moreover, doesn't the principal by volunteering uninformed counsel really deprive a student of his right to counsel which means capable counsel?

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[49] A classic response came from a Caledonia, Michigan, school administrator who reports:

> [The] principal remains in the room. Under certain cirumstances the principal may excuse himself briefly. Admissions seem to come easier to the student if the principal is not immediately present.

An administrator from another state takes an equally permissive view of his role:

> When persons have been suspected of a crime the school facilities and time have been made available to police for questioning. The principal would not remain in the same room unless requested or unless crime involved school property or personnel.

The parents of the student should be informed and should be given an opportunity to be present at the interrogation. Their presence will tend to further insulate the student against police overbearing, real or imagined. 50/ Although there is no absolute constitutional right, either in the student or his parents, 51/ to be present at a police interrogation, their exclusion may have a serious coercive effect on the student. 52/

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[50] A surprising number of school administrators take the position that parents should not be called in for a false alarm. A Hermanville, Michigan school administrator, for example, replies:

> Police can question at any time and is alone with student. Parents are not notified unless police make such a request.

An administrator from Louisville, Kentucky, reports:

> Parents are notified after outcome is found.

One of the most extreme responses comes from a school administrator from another state who reports:

> Police are permitted to question students during the student's study period, but not during class period. Parents are notified after the party has been found guilty or admits the crime. Sometimes the principal remains in the room.

[51] There may be a duty under State law to secure parental permission before allowing police to interrogate a student. Surely the school is not acting in loco parentis when it exposes a student to criminal investigation.

[52] United States v. Fay, 323 F. 2d 65 (2nd Cir. 1963), cert. denied 376 U.S. 915 (1964) (confession of 18-year-old boy declared involuntary when made after 18 hours of questioning. "The final persuasion was an intimation by the police that they would allow him to see his mother for whom he had already asked several times, and a chaplain, if he confessed." Id. at 66).

In an overview, the constitutional duties of the school to the student are crucial to the dignity of both community and student. These duties originate in the American scheme of criminal justice. Our system is accusatorial, not inquisatorial. As a consequence, no person may be compelled by an coercion, physical,[53] psychological,[54] or duplicitous,[55] to give evidence against himself. As the Supreme Court points our, out polity has realized:[56]

> . . . that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult a lawyer, he will become aware of, and exercise these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement then there is something very wrong with that system. [footnotes omitted]

C. Consequences of an Unconstitutional Interrogation

> We cooperate to the fullest extent with law enforcement officials. We do not notify parents unless asked to. Upon request we will send the student to the police station.
>
> The seriousness of the crime does have some bearing, as will the particular law enforcement official.
>
> [Name of School District Withheld]

What sanctions come into play if the school and the police fail to provide the requisite constitutional safeguards in the interrogation of a student suspected of a crime? May the student sue the police or the school? May any evidence procured be used in a criminal proceeding against the student or in a school disciplinary action? The answers to these questions are dependent on several factors.

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[53] Brown v. Mississippi, 297 U.S. 278 (1936).

[54] Fikes v. Alabama, 352 U.S. 191 (1957).

[55] Spano v. New York, 360 U.S. 315 (1959).

[56] Escobedo v. Illinois, 84 Sup. Ct. 1758 (1964).

an innocent student

If the student is subsequently cleared of any criminal activities and the interrogation merely pointed up his innocence, the student has no complaint. He is not damaged. However, school personnel may be disciplined for misconduct.[57] He has breached his duty to protect the student and it should not matter whether the student was fortuitously unharmed by the breach.

Another situation may occur. An innocent student may confess or make incriminating admissions during a "sweating" by police officers.[58] If then the student is arrested or otherwise prosecuted, the student may very well have a cause of action for damages to reputation and for legal expenses incurred because of an unconstitutional investigation licensed by the school.[59]

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[57] But see, Midway School District v. Griffeath, 29 Cal. App. 2d 13, 172 P. 2d 857 (1946) (one isolated act of deceit by otherwise competent teacher held to be insufficient grounds for dismissal).

[58] What should an administrator do in a situation where the police become over-zealous in performing their duty? A Richmond, Washington school administrator reports:

> [I] have on occasion terminated police investigation when it became too heated. [I] told police to continue at police station in parents' presence.

[59] A teacher's responsibility extends to non-action, or failure to warn of dangers in civil actions. Gonzales v. Mackler, 19 App. Div. 2d 229, 241 N.Y.S. 2d 254 (1963) (teacher absent from room may be liable for failure to provide adequate supervision); Lilienthal v. San Leandro Unified School District, 139 Cal. App. 2d 453, 293 P. 2d 889 (1956) (teacher failed to stop a pupil from

a guilty student

If the student has committed a criminal offense, any admissions or confessions furnished the police during an unconstitutional interrogation cannot be used against the student in a criminal trial.[60] Moreover, any evidence gained through the use of this evidence is constitutionally prohibited in any criminal proceeding[61] against the student. For example, if the student under duress told where he had hidden stolen goods, the goods could not be admitted into evidence against him.[62]

May constitutionally defective evidence, not usuable in a state criminal trial, be used against the student in a disciplinary proceeding by the school? Probably not.[63] Although there are no court decisions on this issue, reason would appear to prevent the State from using the evidence to punish the student

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playing with a knife and the pupil subsequently injured another student); Perumean v. Wills, 8 Cal.App. 2d 578, 67 P. 2d 96 (1937) (teacher who repeatedly warned of dangers inherent in school auto shop premises held not liable to injured pupil).

[60] Escobedo v. Illinois, 378 U.S. 478 (1964).

[61] Silverthorne Lumber Co. v. U.S., 251 U.S. 385 (1920); Wong Sun v. U.S., 371 U.S. 471 (1963).

[62] Faced with these consequences the schoolman should reflect on his ethical responsibilities as a citizen to prevent a bungling of an investigation which may well result in permitting a criminal to go unpunished. This is not to suggest that school officials should interfere with police interrogations, but that they should discharge their duties in such a manner as to free them from any complicity in an unconstitutional sweating of a student.

[63] Self-incriminatory statements have been admitted into evidence in juvenile courts. This is because, according to the standard polemic, juvenile court proceedings are not criminal vehicles. They are supposed to act

in any proceeding.[64]

D. Interrogation of Students by School Officials

> If the school takes action parents are notified by phone, in person or by letter. We generally do not call in police to solve our problems. If we have stealing problems, we try to solve them ourselves. . . .
>
> [Whiting, Indiana]

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for the welfare of the child, not to punish him. Dendy v. Wilson, 142 Tex. Crim.App. 460, 179 S.W.2d 269 (1944). There is an increasing awareness despite what labels are affixed to a juvenile court proceeding. It is really a punishment device. This feeling is eloquently put by Justice Musmano:

> The concept that in juvenile court the State acts as *parens patrae* is being somewhat overdone. Even if the State assumes the parental role, this assumption does not prove that, by divine omniscience, it cannot be other than just. It is not impossible for a father, or even a mother, to be unreasonable with offspring. What a child charged with a crime is entitled to, is justice, not a *parens patrae* which in time may become a little calloused, partially cynical and somewhat over condescending. In re Holmes, 379 Pa. 599, 109 A.2d 523, 530 (1954) (dissenting opinion).

The trend is clearly towards a greater recognition of juvenile rights, and within the next decade juvenile courts may very well be compelled to recognize basic constitutional safeguards in our scheme of criminal justice. At present, however, the law would allow virtually any evidence into proceedings of juvenile courts. Consequently, the school may, by the backdoor, punish students with this evidence. Simply turning it over to juvenile court would in many instances result in the commitment of the child supposedly for his own welfare. This commitment to a reformatory in effect removes the child from the school.

For the best overall analysis of the constitutional aspects of juvenile court procedures, see Anteau, *Constitutional Rights in Juvenile Courts*, 46 Cornell L.Q. 387 (1961).

[64] See Colyer v. Skeffington, 265 F. 17 (D.Mass. 1920) (a judicial condemnation of the Department of Justice involvement in Immigration and Naturalization arrests popularly referred to as the Palmer raids of Attorney General Palmer).

Schools have an interest in protecting their students and plant against criminal acts. If a student is suspected of a serious crime committed on school property, do school officials have greater latitude in questioning the student than police officials? Insofar as the school may attempt to secure incriminatory admissions for the purpose of criminal prosecution it would seem that the schoolman would be acting in the same role and should be held to the same responsibilities as a policeman. In both instances State officials are seeking evidence for State criminal prosecution.[65]

Lesser student offenses may be treated differently. A student suspected of a violation of school regulations, but not a criminal offense, may be questioned with slightly greater latitude than a student suspected of a crime. It would not be necessary for a lawyer or the child's parents to be notified and permitted an opportunity to be present. However, if the suspected violation is one requiring expulsion, the school official should advise the student that he may remain silent if he so wishes. The reason for warning a student of his privilege to remain silent rests on a comparison between expulsion from school and a criminal court proceeding.[66] Both are punishments, and the student has some constitutional safeguards against punishments meted out by the State.[67] One of these safeguards would seem to be the privilege against self-incrimination. If this is true, then the student must be counselled as regards this privilege, and such counselling would take the form of a warning by the school principal that the student need not supply answers which may form a basis for expelling him.[68]

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[65] If the student is questioned with the intention of turning him over to the juvenile authorities according to present standards there are no constitutional restrictions on the zealousness with which the questioning may be carried out. See note 63, supra. Apparently, public officials may grill juvenile offenders for the purposes of protecting their welfare, a curious means--end conundrum.

[66] In In re Groban, 352 U.S. 330 (1957), a State fire marshal was permitted to exclude lawyers from administrative investigations of fires. The Supreme Court held that in administrative inquiries, a person's defense is

Another reason the school should advise the student that he may remain silent rests on an analogy to the coerced confession cases, even though failure to so advise suspects in a criminal matter does not, without more, constitute coercion or misleading.[69] These cases hold that a criminal conviction cannot rest on a coerced confession. One of the reasons is that the confession is or

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the privilege against self incrimination. See McCarthy v. Arndstein, 266 U.S. 34 (1924) (privilege may be exercised in an examination to ascertain the property of a bankrupt). See also Counselman v. Hitchcock, 142 U.S. 547 (1891) (goods which may be forfeited in a penal proceeding are protectable by exercise of the privilege against self incrimination).

[67] In Shioutakon v. District of Columbia, 236 F.2d 666 (D.C. Cir. 1956) the court held that a 15-year-old juvenile offender was entitled to counsel in a juvenile court proceeding and, even though his mother appeared with him, the judge's failure to advise him of his rights rendered the proceedings void. See generally, Riederer, *The Role of Counsel in the Juvenile Court*, 2 J. of Family Law 16 (1962).

[68] If the answers to these questions would expose a student to criminal prosecution, he may clearly refuse to answer. In re Groban, 352 U.S. 330 (1957).

[69] Gallegos v. Colorado, 370 U.S. 49 (1962) (14-year-old boy); Reck v. Pate, 367 U.S. 433 (1961) (19-year-old boy with mental age between 10 and 11); Payne v. State, 356 U.S. 560 (1958) (19-year-old, mentally dull); Haley v. Ohio, 332 U.S. 695 (1948) (15-year-old boy); Lee v. Mississippi, 332 U.S. 742 (1948) (17-year-old boy).

may be inherently unreliable. Consequently, criminal punishment based on unreliable evidence denies a person due process of law guaranteed by the Fourteenth Amendment.[70] Carrying this reasoning into the school situation, it follows that an expulsion based on a coerced admission of guilt is an arbitrary expulsion denying the student his due process rights.[71] Consequently, to promote voluntary admissions of guilt, a student's right to remain silent should be clearly pointed out to him.[72]

The final consideration in student interrogation is--what can the school do to the uncooperative or silent student? May the school expel or punish him for refusing to confess guilt to a crime or for refusing to admit a violation of school rules? Or does a penalty affixed to the exercise of constitutional rights in effect abrogate those rights?

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[70] Evidence procured as a result of an involuntary confession, such as the location of stolen articles, would be admissible in an expulsion proceeding. Physcial evidence does not partake of the inherent unreliability of a coerced confession. Physical evidence derived from the use of a coerced confession may be rendered unusuable on another ground however. See pp. 19 to 21, supra.

[71] This is not to say that failure to warn will be an absolute presumption that students' admissions were non-voluntary. The purpose of the warning is to provide evidence that the admissions were voluntary.

[72] Gideon v. Wainwright, 372 U.S. 335 (1963), extended the right to counsel to all felony cases. The Court has yet to rule upon whether the right to counsel applies to serious misdemeanors, or indeed to all misdemeanors. Similarly, school disciplinary actions have not been considered by the Court. Cf. Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961) (holding that a student expelled from an institution supported by public funds must have a "fair" hearing).

The Supreme Court decisions on whether a person may be penalized for remaining silent are at best in confusion and at worst, contradictory. On one side there is authority that State employees may not be dismissed from State employment simply on the basis that they have exercised their Fifth Amendment privileges.[73] On the other side, the Court has held if a State employee is ordered by his superior to testify at an administrative hearing, and the employee invokes the Fifth Amendment, the employee may be dismissed for insubordination.[74]

To the pragmatic mind the cases are irreconcilable. A government employee to be dismissed for invoking the Fifth Amendment need just to be first ordered to answer by a superior--a formality at best. To the theorist the cases mesh. One holds that an exercise of the Fifth Amendment privilege may not be used by the State as a basis for inferring criminal traits in the invoker. Consequently, such an inference cannot be used as a basis for dismissal. The other line of authority holds that an employee who refuses to supply information in which the State has a legitimate interest may be discharged for insubordination.[75]

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[73] Slochower v. Board of Higher Education, 350 U.S. 551 (1956) (holding that a claim of privilege cannot be used as evidence of the commission of a crime).

[74] Nelson v. County of Los Angeles, 362 U.S. 1 (1960).

[75] The same theory has been used to deny admission to the bar of a State, Konigsberg v. State Bar of California, 366 U.S. 36 (1961); In re Anastaplo, 366 U.S. 82 (1961).

Applying these cases to refractory students some decisions must be made. One is whether the loss of State employment is as valuable a loss as expulsion from school. Or phrased differently, does a citizen have a greater right to State education than to State employment? The second is whether the State interest in securing the information sought outweighs the student's interest in remaining silent.[76]

Although there is no court decision on point, to be on solid constitutional grounds the school should, (1) not infer guilt from the silence of a questioned student and (2) not punish him for being uncooperative insofar as cooperation means confessing to a crime or serious breach of conduct. Alternatively, if a student's silence is based on a desire to protect others and not himself, he may certainly be punished.[77] This should be made clear to the recalcitrant student.

Overall school discipline will not be overly hampered. Consideration for the dignity of the student and for fair play should infuse into the school atmosphere a greater respect for school and community regulations.

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[76] In the State bar admission cases cited in note 75 supra, the Court balanced the interests of the State in uncovering subversives against the interests of the particular parties in becoming lawyers. The latter found wanting. But in Shelton v. Tucker, 364 U.S. 479 (1960), a teacher refused to list all organizations to which the teacher beonged for a five-year period prior to the date of questioning, and the Supreme Court upheld the teacher, saying:

> The statutes comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers. Id. at 490.

[77] Rogers v. United States, 340 U.S. 367 (1951).

CHAPTER IV

RELIGION IN THE PUBLIC SCHOOLS

The history of church and State in the United States is the story between the idea and the reality. The wall between church and State has been more a bridge than a barrier. Tax exemptions, Federal grants to sectarian schools, and draft tolerance of conscientious objectors are familiar examples of the complicity of the secular and the sectarian. This interrelationship is no less true in the field of public education.

I. THE PRECEDENTS

> Ever since the Regent's Prayer Case, the Abington Bible-Reading Case, etc., our teachers have been treading a fine line between teaching about religion and teaching the tenets of religion. We believe that our culture is the product of a Judeo-Christian heritage--yet we have problems in not offending the children's religious belief when we use a standard music book which may contain a hymn.
>
> [A Vermont School System]

The most important cases are almost too recent to be called precedent. The first, Engel v. Vitale,[1] was decided in 1962. The Supreme Court held that a prayer, composed by the Board of Regents of New York, could not be said in the public schools of New York. The prayer in the case was a carefully drawn, non-sectarian piece of twenty-two words, purportedly offensive to no recognized religion.[2]

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[1] Engel v. Vitale, 370 U.S. 421 (1962).

[2] "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Id. at 422.

As could be expected, the decision was attended by widespread public criticism.[3] Nevertheless, no serious threat of constitutional amendment to modify the ruling arose. On the other hand, the decision gave rise to more questions than it settled. The principle point of speculation was whether it would be limited to religious exercises composed and prescribed by the State or whether it would extend to all religious exercises.[4]

The Court answered the speculators within the year. The two cases were reported under the title *Abington School District* v. *Schempp*.[5] The religious exercises involved were readings from any version of the Bible and the Lord's Prayer. And the Court's decision was that these ceremonies, when conducted to advance religion, abridged the Constitution of the United States.[6]

The *Schempp* case put to rest the core issue, *i.e.* daily religious exercises in the school. The case did not specifically chart the outer proscriptions of its holding, however.[7] To that task we now turn.

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[3] See, for example, the remarks of Bishop James Pike in the October, 1962 edition of *The Reader's Digest*, pp. 78-85. Bishop Pike asserted that the decision of the Supreme Court "*deconsecrates* not merely the schools, but the *nation*."

[4] Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L.Rev. 1031 (1963).

[5] Abington School District v. Schempp, 374 U.S. 203 (1963).

[6] *Id.* at 223-24.

[7] Comment, *Local School Boards and Religion: The Scope of Permissible Action*, 6 Santa Clara Lawyer 71 (1965).

II. STATE COMPELLED EXERCISES

> The Lord's Prayer and daily Bible readings were required prior to the Supreme Court decision. We plan to continue every method to make our students conscious of their dependence upon an Almighty Father providing that (such) method has not been precisely condemned as unconstitutional.
>
> [A New Jersey School System]

The First Amendment, as it is applied to the States by the Fourteenth Amendment, states that there shall be

> . . . no law respecting the establishment of religion, or prohibiting the free exercise thereof; . . .

Note that there are two mandates, not one. Nevertheless, they, in particular cases, may converge. 8/ For example, if a State required the reading of only the King James version of the Bible, the State would clearly be violating the Establishment Clause. And, insofar as Catholics were involved, the State would be prohibiting their choice of Scripture, a State violation of the Free Exercise Clause. This was expressly recognized by the Court in the Engel v. Vitale case, where the Court stated:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. 9 /

While it is important to recognize the twofold nature of these provisions, the Establishment Clause is much more important than the Free Exercise

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[8] 374 U. S. at 222.

[9] 370 U. S. at 431.

Clause to school administration.[10] More specifically, slighting one religion in favor of another is to the American conscience an odious thing. In a pluralistic society the survival of each sect is dependent on the protection of all. Indeed, the framers of the First Amendment had fresh in their minds, if not in personal experience, the religious persecutions of Europe. Consequently, because State discrimination among religions is so clearly opposed to the American ideals, it has not developed a tradition.[11] It is as foreign to school administration as it is to other fields of State participation.

The same cannot be said of the Establishment Clause. Indeed, as the Court itself has recognized

> [W]e are a religious people whose institutions presuppose a Supreme Being.[12]

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[10] This has been the case since the days of the founding fathers. One author comments:

> "To be sure, the First Amendment was never intended to drive religion and prayer out of the schools. Rather, it wanted to guarantee the right of the states to regulate their religious affairs independent of federal control. . . . [T]he advocates of disestablishment did not act out of personal animosity against religion as such, whatever their personal opinions. They simply saw themselves confronted with the growth of rival sects, the Presbyterians against the Anglicans in the south, and the Baptists, Methodists, Unitarians, Catholics, and other denominations against the Calvinists in the north. As a matter of fact, in several places disestablishment existed before the Bill of Rights, either out of convenience, respect for religious liberty, or both."
>
> Freund and Wick, Religion and the Public Schools, 35-36 (1965).

[11] Kauper, Frontiers of Constitutional Liberty, pp. 103-06 (1956).

[12] Zorach v. Clauson, 343 U.S. 306, 313 (1952).

As the State and local governments became more and more involved in the education process, the more they reflected the religious attitudes of the people.[13] And hence, the tradition of official State endorsement of religious ceremonies and displays.[14] The various types of traditional State participation must now be weighed against the mandates of the Establishment Clause.

A. Required Exercises

Prayers and Bible readings are not required in our

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[13] A school administrator from Kansas reports:

> "We have in Kansas a good many communities that are predominantly one religion. The people in this local community operate a public school, but since they are of one denomination, the school is run very much like a denominational school."

[14] Sometimes official endorsement takes the form of a statute. For example, Florida Statutes Annotated, Section 231.09(2) reads as follows:

> "[Teachers] shall perform the following functions: Have, once every school day, readings in the presence of the pupils from the Holy Bible, without sectarian comment."

Official endorsement might take the form of a school's regulation. One school district has the following regulation:

> Section 6.03(d) Opening Exercises "The schools shall be opened each morning with the reading of the Holy Bible, without comment, and praying the Lord's Prayer."

(The administrator who reported the existence of this regulation remarked that it would "undoubtedly be changed in the light of the recent U.S. Supreme Court ruling.")

State and local governments may also give endorsement to religious practices in schools by means of acquiescence. A school district reported such a situation in the following manner:

> "Prayers and Bible reading are not required in our public schools, but the general practice is to have a chapel assembly or a home room program during which time selections from the Bible are read and prayers are offered. Along with these, songs are sung, usually the songs that the children sing in their church services."

> public schools but the general practice over the state is to have a chapel assembly or a home room program during which time sections from the Bible are read and prayers are offered. Along with these songs are sung, usually the songs that the children sing in their church services.
>
> Christmas trees and carol singing are enjoyed by our people across the board throughout the State.
>
> The Staff of the State Department of Education assembles each Monday morning for a thirty minute devotional program. Songs are sung, prayers are offered, and selections from the Holy Bible are read. In most of the devotionals a visiting minister from one of our town churches brings a message.
>
> The Staff of the State Department enjoy the delights of a huge Christmas tree carol singing, followed by refreshments and general get together discussions at Christmastime.
>
> [A Mississippi School Officer]

The school may not require students actively to participate in any religious ceremony, such as Bible reading or prayer.[15] Moreover, passive participation, in the sense that the child is permitted to remain silent, is also precluded. Permission to leave the room or premises will not save these exercises inasmuch as the fatal flaw is the school endorsement of religion, not the embarrassment to a particular student.[16]

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[15] State ex rel. Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902). (A teacher was having Bible reading, prayers, and hymn singing in the school and as part of the regular school program.)

[16] Allowing the child to leave the room might cure any defects arising under the Free Exercise Clause, but as noted above, the primary problems have their origin in the Establishment Clause. Thus, allowing the child to leave does not operate to remove the school's endorsement of the religious act or ceremony. See the opinion of Frankfurter, J., concurring in McCollum

B. Permitted Exercises

> Prayers and Bible reading are not required but may be (engaged in). We do not feel any person should be prohibited from praying, reading the Bible, or singing carols. We open many exercises by prayer and will continue to do so. To do otherwise would be a denial of freedom to worship.
>
> [An Iowa School System]

A school may not permit religious exercises even if requested by students, if such are to be conducted during the regular class day with school personnel attending. It may be that the school can permit students to use the school premises outside of school hours for religious exercises. At least a Federal Court in Michigan has so held.[17] The main consideration here seems

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v. Board of Education. "The fact that this power has not been used to discriminate is beside the point. Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend [released time religious classes.] 333 U.S. 203, 227.

[17] Reed v. Van Hoven, 237 F.Supp. 48 (W.D. Mich. 1965). But cf. Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965). In the Reed case, the District Court made an effort to achieve an accomodation between the parties by allowing the children who wanted to pray to do so entirely on their own in certain classrooms prior to the beginning of the school day. But the court prescribed a detailed procedure for such accomodation so that the praying students would receive no assistance or encouragement from the faculty or staff. The Stein case, however, upheld the right of the local school board to prohibit, in its discretion, all prayers in the schools. In other words, the court concluded that a student does not have a right to pray in a public school even it such prayer is not in any way instituted or encouraged by the teacher or principal.

to be the practical thrust of these activities. If the school appeared to be a disinterested party to occasional ceremonies, its participation is certainly minimal.[18] Conversely, if these ceremonies are part of a formalized pattern, appearing to the community as having the tacit support and the approbation of the school, they may well be unconstitutional.[19]

In an overview, the Establishment Clause would appear to bar any religious exercise conducted as a regular part of the school curriculum,[20] or conducted by school personnel acting for the school.[21] However, school property may be used for religious exercises outside regular school hours but not during regular sessions.[22]

III. THE NATURE OF THE EXERCISES

> The singing of religious songs and the creation of religious symbols through art classes must grow out of the expressed interest of the children and are not a part of the teacher's presentation. Religion is historically treated in the intermediate grades with a minimum of teacher editorializing.
>
> [Skokie, Illinois]

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[18] Lawrence v. Buchmueller, 40 Misc. 2d 300, 243 N.Y.S. 2d 87 (Sup. Ct. 1963).

[19] Evans v. Newton, 86 S.Ct. 486 (1966).

[20] Zorach v. Clauson, 343 U.S. at 312-13 (1952).

[21] Reed v. Van Hoven, 237 F.Supp. at 54-55. (It should be noted that school officials were not even allowed to ring a bell to signify the beginning of a voluntary prayer session.)

[22] Gilbert v. Dilley, 95 Neb. 527, 145 N.W. 999 (1914). (A school board allowed a public school to be used five times per year for church purposes); Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697 (Fla., 1959) (Public school was used during non-school hours as a temporary place of worship. No public funds were expended; the court held that this did not constitute an establishment of religion.)

The principles are quite clear here. Religious exercises are forbidden in the school, but school activities conducted for legitimate school purposes are not forbidden simply because they may have some religious components. The Supreme Court in the Schempp case pronounced:

> The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power ascircumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. 23/

The clarity of these principles blurs, as that of all abstract propositions will, when applied to specific fact situations. But difficulty of application is no reason for abdicating the task. And so to the job of analyzing familiar school activities in the light of the Prayer cases.

A. The Salute to the Flag

> Jehovah's Witnesses do not want the child to pledge [allegiance] to [the] flag. Nor do they want the child to participate in any celebration of patriots [sic], Thanksgiving, etc.
>
> [Austin, Texas]

In the salure to the Flag the children are requested to affirm that ours is "one-Nation, under God", clearly a religious notion. But the thrust of the salute is to affirm a patriotic devotion, not to affirm a religious relationship between pupil, Nation, and God. Consequently, for the great majority of students there is no constitutional issue.

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[23] Abington v. Schempp, 374 U.S. at 222.

However, what about the isolated instance of the child to whom the primary effect of the oath seems religious? The alternative course for school authorities here would be to excuse the student from the exercise. Indeed, this alternative would be a requisite in any situation in which a student sincerely objects to a school activity on the basis of religious belief. (Except, of course, regulations designed for the personal protection of the individual student or others, e.g. vaccinations.) A recent New York case on this issue insisted on the non-compulsory nature of the flag salute.[24]

B. Inspirational Readings

> We are in accord with all Supreme Court rulings and even most State rulings.
>
> We have found that "Separation of State and Church" does not mean that we cannot teach and practice Christianity and patriotism in our schools.
>
> We shall continue to have prayers, read the Bible, give pledge of allegiance and teach Christianity and patriotism and do not anticipate any interference.
>
> [A Texas School System]

The school, indeed the State, has the right to teach its members ethical and moral virtues. This is true, at least insofar as right reason is conducive to socially approved (or legal) conduct.[25] To this end the school may prescribe dailing readings from familiar works of ethical and moral content. For example, the aphoriams of Emerson and Thoreau are excellent guides for personal conduct, as are patriotic statements and deeds[26] from the history of this country and others,[27] and finally, it cannot be doubted that the Bible may be used as a source of examples of preferred social values.[28]

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[24] Lewis v. Allen, 5 Misc. 2d 68, 159 N.Y.S. 2d 807 (Sup. Ct. 1957) But Cf. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). In Barnette, the plaintiffs were Jehovah's Witnesses who claimed that their freedom of religion and speech were being violated by a compulsory flag salute. The Supreme Court sustained their position and struck down a compulsory salute.

[25] "Consistent with [Engel v. Vitale] the schools may follow practices

Based on the foregoing assumptions, it follows that a program of inspirational readings may include the Bible as a source.[29] Again, this will square with the Supreme Court's "primary purpose and effect" test. In teaching the nobility of Leonidas at Thermophylae, there is no real affirmation of the divine nature of the oracle's prediction that Sparta would lose a great king. Is the example of the Good Samaritan likewise basically a secular lession? If so, then its use in the classroom is permissible.

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and teaching programs that help to create awareness, appreciation and understanding of the religious factor in the life of the nation and its citizens. They may create respect for the moral values which reflect the community consensus and which illuminate the purposes and processes of our democratic society." Kauper, supra note 4, at 1067.

[26] Historical documents, such as the Declaration of Independence with its reference to a Creator as the source of individual rights, and historical acts, such as the migration of the Pilgrims to North America and the Mormons to the West, cannot be fully appreciated without the understanding of the fact that such acts had their roots in religious faith.

[27] Joan of Arc and Martin Luther are examples of persons whose deep religious faith motivated actions which had profound historical consequences for Europe.

[28] The Book of Proverbs might be a source of such inspirational reading as a guide to personal conduct. Conceivably, the secular aspects of Christ's teachings (such as his role as a social critic) might also serve as a proper source of instruction.

[29] Abington v. Schempp, 374 U.S. at 225. State ex rel Weiss v.

A program of daily inspirational readings has some definite proscriptions however. It may not consist of solely or mainly Biblical passages. Nor may any purely religious passage, e.g. the crucifixion, be used.[30] Inspirational readings must be to inspire social, not sectarian, ideals, and they are strictly limited to this end.

C. Baccalaureate Services

> [L]ast year . . . the state Attorney-General issued an opinion that Baccalaureate Services held under schools' auspices in school buildings for graduating seniors were in most cases illegal. As a result, for the first time in school history, the Catholic seniors were absent from this program.
>
> [Golden, Washington]

One purpose of the traditional baccalaureate service has been to secure divine blessing and inspiration for the future graduates of the school. If this remains the sole purpose of such a service, it fails the test of the First Amendment. The crucial point here is simple: The predominant function of the baccalaureate service (may) be an invocation of divine favor for the road ahead of the graduating class. Obviously, it need not be; and to the

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District Board, 76 Wis. 177, 199-200, 44 N.W. 967, 974 (1890):

> "[T]here is much in the Bible which cannot justly be characterized as sectarian. There can be no valid objection to the use of such matter in the secular instruction of the pupils. Much of it has historical and literary value, which may be thus utilized without violating the constitutional prohibition. It may be used to inculcate good morals,--that is, our duties to each other,--which may and ought to be inculcated by the district schools. No more complete code of morals exists than is contained in the New Testament, which reaffirms and emphasized moral obligations laid down in the ten commandments. Concerning the fundamental principles of moral ethics, the religious sects do not disagree."

[30] 374 U.S. at 224.

degree that it is not, it is a permissible school exercise.[31]

In reality, the problem of the baccalaureate service is closely akin to that of inspirational reading programs. If the school is careful to retain a predominantly philosophical or ethical content in both, they would most probably be constitutionally permissible.[32]

D. Other Programs

> Emphasis upon the Nativity is the center of some controversy in our community. I believe a solution to this problem will be rather difficult.
>
> [A Pennsylvania School System]

* * * * *

> We are currently facing the problem of what to do next year about eliminating an "Uncle Ned" character who has been permitted to tell Christian Bible Stories to elementary classes. Our new school policy which becomes effective July 1 will prohibit this. We already are feeling some pressure from individuals who wish it continued. Other individuals have protested such story telling. Federal law would seem to support such prohibition as our new policy outlines.
>
> [A Michigan School System]

Many legitimate school activities contain some religious or sectarian aspects. Thanksgiving plays and Christmas assemblies are probably the most familiar examples. The test of constitutionality here is the same as that applied to all other exercises having some religious characteristics: the primary purpose and/or effect test.[33]

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[31] 374 U.S. at 222.

[32] Comment. Local School Boards and Religion: The Scope of Permissible Action, 6 Santa Clara Lawyer, 71, 74 (1965).

[33] Abington v. Schempp, 374 U.S. at 222.

The Christmas assembly may be a chance of the various language courses to show how, with indigenous songs and costumes, certain nations celebrate a certain holiday. There is no constitutional quarrel here. On the other hand, an assembly in candlelight with a creche as a focus should be disallowed.

The Thanksgiving play seems to be an easier problem. Certainly, it shows people recognizing a personal God, but it is a play about people giving thanks to their God. It is not a play to urge people to give thanks to a God.

St. Patrick's Day and St. Valentine's Day have been so totally secularized that they pose no difficulty. However, they serve as excellent examples of how a one-time religious event may become a part of our secular heritage. Moreover, they clearly demonstrate that ours is a changing nation, of what is religious and what is not. What was sectarian thirty years ago may not be today. And the school administrator should be sensitive to this fact in deciding whether to permit a certain exercise or not.

IV. CONCLUSIONS FOR THE SCHOOL ADMINISTRATOR

The school administrator should keep in mind, above all else, the duel nature of the test stated in the Abington case: what is the "primary purpose and effect" of the activity in question. Any activity in the school must not only be intended to teach religion, but it must not, irrespective of intent, create a religious response in the students. Thus, the activity must be tested not only from the school's point of view, but also from the students'. If the school does not intend the activity to be a religious exercise, and the students do not regard it as such, the activity should be constitutionally permissible.

CHAPTER V

HIGH SCHOOLS, MARRIAGE, AND THE FOURTEENTH AMENDMENT

> In 1958 we expelled four students for skipping away from school and going on a week-long tour and getting married. We were sued by one parent and the court ordered that we readmit the one girl. The board, of course, had no choice but honor the order. They stipulated numerous conditions for the girl to meet, being practically isolated from all other students. The girl then chose not to return to school.
>
> [A Nebraska School System]

When high school students marry they face a host of problems. More often than not the it'll-never-lasters, the month counters, and residual parental disapproval ill-star the beginning of their marriage. Financial problems, generally abetted by a pregnancy, attend the new marriage as further disruptive influences.

With the honeymoon over aborning, what do the young marrieds face when they attempt to return to their high school classes?[1] The Memphis Tennessee Board of Education tells them that:

> Husband and wife may not attend the same school. In such cases one pupil must transfer. Married pupils attend under the following regulations: (1) No married pupil may attend a school that does not have a high school as part of its organization; (2) Husband and wife may not attend the same school; (3) Married girls must drop out of school if

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[1] Over two-thirds of the school units surveyed placed restrictions on their married students which were not placed on their single students. The restrictions ranged from encouraging them to enroll in an adult or evening school to summary and final dismissal.

> they become pregnant. (School has right to request doctor's statement if they have reason to suspect pregnancy and pupil does not withdraw); (4) Married pupils must not be guilty of any "loose" talk around other pupils; (5) Husband and wife cannot loiter in building where the other is attending school; (6) Married pupils must be regular in attendance; (7) Scholastic achievement must be maintained.

Hillrose, Colorado treats them to conjugal apartheid because:

> A married life is entirely different from that of a single student, they don't talk about the same things and you can get into difficult situations. They should be out of school activities or the school might get hurt.

And in Bowbells, North Dakota, the married students discover that they are simply expelled.

Does the law protect married students from arbitrarily based regulations? Does the Constitution of the United States, demanding that States treat citizens equally, demand equal treatment of newlywed students? 2 /

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[2] Whether or not teenage marriages are favored depends upon the perspective taken. An Ohio court has drawn a distinction on the issue of teenage marriages:

> It is indeed the policy of the law to look with favor upon marriage and to seek in all lawful ways to uphold this most vital social institution, every intendment being in favor of matrimony.
>
> This policy, however, is referable to those of lawful age who enter into the marriage relationship . . . . On the other hand, the legislative policy is otherwise insofar as an underage marriage is concerned . . . . Under such circumstances the consent of the juvenile judge must first be obtained. . . .
>
> It thus appears that in this state it is clear that the public policy is not favorable to and in discouragement of "underage applicants" for matrimony.
>
> State v. Stevenson, 189 N.E. 2d 181, 187 (1962).

And are school authorities and boards of education exposing themselves to legal liability in their treatment of young marrieds? The answer to all three of these questions is yes.

What is the law of married students and the schools?

The law books contain very few cases considering the rights of married students. The reasons for the lack of litigation, or at least reported litigation, are numerous but clear. The main reason seems to be that students simply drop out of school upon marrying.[3] The financial exigencies of their new status and pregnancy in many cases,[4] make it difficult, if not impossible, for most to remain in school.[5] An almost equally important reason is the fear, justified or not, that suit against school authorities will result in personal

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Apparently, the court did not consider that the particular marriage at hand was a State approved marriage, although it was one which did receive the approval of a State juvenile judge.

From another perspective, once a teenage marriage has occurred, should not school authorities aid, not limit or punish, the specific couple concerned?

[3] This is not to suggest that marriage is the exclusive cause of school dropouts. In fact, studies have found that high school marriages make up a very small part of high school dropouts. See *e.g.*, Miller, *The Dropout: Schools Search for Clues to This Problem*, School Life, May 1963, p. 5.

[4] One survey revealed that 57% of high school girls and 83% of high school boys were involved in marriages having probable pre-marital pregnancies. Burchinal, *School Policies and School Age Marriages*, Family Life Coordinator, March 1960, p. 43.

[5] Several school districts report as follows: "We have no regulations. So far they have all dropped out of school;" "No regulations . . . in most instances they withdraw;" "This has not created much of a problem to us . .. They usually stop school before there is need of making an issue of it." The last remark may lead one to believe that dropouts by married students may not be exclusively their idea.

retaliation even if successful. A whats-the-use shrug pervades.

Another reason for the scarcity of reported cases is the time factor in litigation. A lawsuit may take several years until all avenues of appeal are taken. By this time the aggrieved students, if not previously expelled, may very well have graduated, making the case moot. [6]

There is virtually no State legislation on the problem of married students in high school. What State legislation there is simply provides that they are excused from the compulsory attendance laws. [7] Consequently, practically all formal regulations of married students emanate from local boards of education. And, as may be expected, there is very little uniformity of regulations within a single State, let alone uniformity among States. In most States the absence of well-considered statewide legislation results in leaving the married students to the whim of the particular school district in which they reside. One school official reported "There are no State regulations concerning married students. The practices among the schools vary from barring married students to complete disregard of the marital status."

These two factors - the absence of decided cases and the dearth of uniform State legislation - dictate a difficult path for a legal analysis of rules affecting married students.

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[6] See Cochrane v. Board of Education, 103 N.W. 2d 569 (Mich. 1960); State v. Chamberlain, 175 N.E. 2d 539 (Ohio 1961). Whether a case becomes moot or not by graduation depends upon the relief requested. If the relief requested is damages, certainly the right survives graduation.

[7] *E.g.*, Fla. Stat. 232.01.

One course, and the course adopted here, is to analyze actual policies of school systems located throughout the nation. These policies will be tested against the United States Constitution, which guarantees that States must accord persons due process of law and requires equal protection of the laws.

I. COMPULSORY ATTENDANCE LAWS AND MARRIED STUDENTS

> Is a pupil under sixteen years of age who marries subject to the compulsory education law?
>
> Yes.
>
> Handbook on New York State Educational Law (1962 Revision) Sec. 7.28.

It is well settled in the law that States may enact compulsory school attendance laws. The foundations of State power to do this are threefold:

> (1) The State may legitimately care for its individual members, especially children, as an alter parent.[8] This role of the State is seen most clearly in its protection of neglected and delinquent children.[9] And there has been little dispute that the power to protect the health of neglected children does not extend to the educationally neglected children.[10]
>
> (2) The second basis upon which a State may compel persons to attend school is that a State may protect itself against persons becoming public charges.[11] More

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[8] The more elegant and obfuscatory term is parens patria.

[9] For an excellent article urging constitutional safeguards in the treatment of juveniles by the State, see Antieu, Constitutional Rights in Juvenile Courts, 46 Corn. L. Q. 387 (1961).

[10] Minersville School District v. Gobitis, 310 U.S. 586 (1940); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

[11] State v. Gans, 168 Ohio St. 174, 151 N.E. 2d 709 (1958); Cf. Buck v.

> specifically, a State may demand that persons receive a minimum amount of education to prevent them from becoming dependents on state support in the future.
>
> (3) The third basis of compulsory education is a corollary of the second. It is based on the proposition that a State has a right to the talents or abilities of its members. Once this proposition is established it follows that a State may compel the development of the talents and abilities of its citizens.

So plenary is the power of States to compel education of its youth that no case has challenged it in recent decades.[12] The U. S. Supreme Court case most nearly on point is Pierce v. Society of Sisters.[13] There the State of Oregon enacted a compulsory education law requiring that all children attend only public schools. The Supreme Court held this regulation unconstitutional pointing out that parents should have a religiously-based freedom of choice of education. However, counsel for the successful plaintiffs did not question the power of Oregon to require an education. The question presented was whether Oregon could prevent a parent from adequately educating his child in a private religious institution. Couched in these terms the question, at

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Bell, 274 U.S. 200 (1925) (holding that a State may sterilize persons likely to reproduce children of low mentality, probably future public charges).

[12] People v. Levisen, 404 Ill. 574, 90 N.E. 2d 213 (1950) (Parents held not violating compulsory school attendance law when seven year old child taught regularly by college educated mother; however, power of State to compel education unquestioned). Cf. Knox v. O'Brien, 7 N.J.Sup. 608, 72 A. 2d 389 (1950) (parent convicted of violating attendance law where home instruction given to child was not equal to public school instruction); State v. Counort, 69 Wash. 361, 124 Pac. 910 (1912) (home instruction not equivalent to the private school exception to compulsory attendance law).

[13] 268 U.S. 510 (1925).

least in a relatively free society, answers itself.

Only four reported cases have considered whether married teenagers may be compelled to attend school.[14] All four decisions do not face the issue. Instead, the courts grafted an exception for married students onto State compulsory school attendance laws. Although the results of all four decisions were the same, there was some variation in the judicial reasoning.

Two Louisiana decisions recognized that marriage emancipates a child from parental control and places the child more or less on his or her own.[15] Consequently, married girls 14 and 15 years old were held not be children over which a "parent, guardian, or other person had control or charge of" within the compulsory school attendance statute.

The Louisiana courts are probably correct as a matter of statutory interpretation, at least insofar as the particular statute involved was concerned. Certainly parents or guardians of married teenagers should not be held responsible for the truancy of their married children. They no longer control their former charges, nor should they. The decisions are probably correct as regards the legislative intent behind the school attendance laws. In all probability the legislature never considered whether married students should be compelled by the State to attend school,[16] even though the parents were not the instruments of the compulsion.

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[14] State v. Priest, 210 La. 389, 27 So. 2d 173 (1946); In re Goodwin, 214 La. 1062, 39 So. 2d 731 (1949); State v. Gans, 168 Ohio St. 174, 151 N.E. 2d 709 (1958); In re Rogers, 234 N.Y.S. 2d 172 (1962).

[15] State v. Priest, 210 La. 389, 27 So. 2d 173 (1946); In re Goodwin, 214 La. 1062, 39 So. 2d 731 (1949); *Cf.* State v. Cronin, 220 La. 233, 56 So. 2d 242 (1951), holding that a married child could be a juvenile delinquent in Louisiana.

The most bizarre case involving married students and school truancy arose in Ohio.[17] There an eleven year old girl was taken by her parents to West Virginia where the parents apparently engineered the issuance of a marriage license (upon which the girl's age was stated to be seventeen), then they promoted the girl's subsequent marriage. When the parents returned to Ohio they were found guilty of contributing to the delinquency of a minor by the Juvenile Court. Upon appeal the judgment was affirmed.

The appellate court reasoned that the matrimonial duties of housekeeping and child bearing would prevent the girl from attending school and, therefore, make her a "delinquent" under the Ohio delinquency statute. In the alternative, the court reasoned, if the child did in fact attend school regularly, her association with other children would contribute to their delinquency.

The court did not decide whether the married girl herself could be compelled to attend school. The disposition of the court appeared to be that the girl would be technically a truant, but no remedy could be taken against her because of her new status. In other words, her truancy would be excusable for her, but her parents would not be excused for causing it.

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[16] This factor was clearly recognized by the New York Family Court which commented, "Times and mores of people have changed since the Legislature first created compulsory education. It is doubtful that any thought was given then to the existence of a situation such as is now before the Court relative to school attendance." In re Rogers, 234 N.Y.S. 2d 172, 173 (1962).

[17] State v. Gans, 168 Ohio St. 174, 151 N.E. 2d 709 (1958).

The most recent case to consider compulsory education of married students arose in New York.[18] In a refreshingly candid opinion, the Family Court of New York decided that a fifteen year old married girl should not be compelled to attend school against her will. However, the court did not decide that the legislature could not compel the girl to attend. The Court simply decided that the legislature had not spoken on the question, hence the issue was left to the court's discretion.

The New York court expressed the same concern about public school morals as the Ohio court in the previous case. And, when weighing the gain to the individual girl against the harmful effects on "school children of such young and impressionable ages", the former was found wanting. (It should be remembered that the girl involved in the Ohio case was eleven, and the girl in New York was fifteen - a considerable difference in ages of their probable associates).

Summing up, the only reported cases have held that, in the absence of a clear mandate by the legislature, married students may not be compelled to attend school. On the other hand, the courts have not decided that a clear mandate by the legislature would be constitutional. When the issue is finally met the answer will probably be yes, so long as their economic or physical welfare is not endangered.[19]

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[18] In re Rogers, 234 N.Y.S.2d 172 (1962).

Two of the bases for a State's right to compel persons to attend school are: (1) a State may protect itself against future public charges, and (2) on the positive side, a State has a right to develop the talents of its members. These bases apply regardless of the age of persons compulsorily educated. They would also be applicable regardless of the status of persons. Consequently, on logic alone married students may be compelled to attend school.

There are two exceptions. One is that compulsory education may not prevent the breadwinner of the family from reasonably sustaining the family.[20] The second exception is that the health of a prospective mother may not be endangered by compelled class attendance, especially in the final months of pregnancy. Both of these constitutionally-required exceptions are grounded in considerations of physical danger. Constitutional considerations are many times, as here, weighing processes. Specifically, the State interest in an educated populace must be balanced against the deprivations to individuals in the furtherance of the State interest. [21] When the deprivations to persons are slight or mere inconvenience, the State interest in an educated populace clearly may be promoted. [22] On the other hand, if the deprivations to the individuals affected are great enough to endanger their very lives, then the State's interest in education must give way. [23]

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[19] Political realities dictate that it will be a long time before married youngsters will be compelled to attend school. Voting parents do not want their single children exposed to married children of the same age. The parents fear married teenagers will exert an immoral influence on unmarried teenagers. Secondly, parents are certain that the school body generally will be encouraged to marry very young if exposed to their married peers. For these reasons, school authorities and members of boards of education have everything to lose and nothing to gain politically by proposing compulsory education for married teenagers.

[20] Evening and Saturday classes would in most cases obviate any economically based objections by married students.

Now to the other side of the coin. The previous discussion considers legal problems of a State attempting to promote the secondary education of its young marrieds. In a sense, that issue is moot. Few, if any, school systems compel education of married teenagers despite the age of the couple. In reality, the situation is just the opposite. Most school systems have regulations which discourage married students from participating in the public education process. These regulations range from immediate and final expulsion to encouraging the students to transfer to an adult educational program.

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[21] In Shelton v. Tucker, 364 U.S. 479 (1960), the Supreme Court held that teachers did not have to reveal all their associational ties as a condition of employment in public schools. For more balancing tests by the Supreme Court see Talley v. California, 362 U.S. 60 (1959); Cantwell v. Connecticut, 367 U.S. 820 (1961). But see Western Union Telegraph Co. v. Pennsylvania, 308 U.S. 71 (1961).

[22] Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192 (1912); Jacob Ruppert, Inc. v. Caffey, 251 U.S. 264 (1920); Schlesinger v. Wisconsin, 270 U.S. 230 (1926) (dissenting opinion); Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946); Beilan v. Board of Education, 357 U.S. 399 (1958).

[23] Perhaps the polar extremes of balancing governmental interests against individual freedoms may be seen in Korematsu v. United States, 323 U.S. 214 (1944) (American citizens of Japanese ancestry imprisoned in internment centers to protect national security) and Estep v. United States, 327 U.S. 114 (1946) (compulsory military service in time of war). In both examples the government's interest, self perservation, is perhaps its greatest interest. Consequently, persons may be called upon to sacrifice their lives or liberty in the promotion of this basic governmental interest.

II. MARRIAGE AS GROUNDS FOR EXPULSION OF STUDENTS

> We don't retain married students.
> [Honolulu, Hawaii]

Only two cases have decided whether a State may permanently exclude married children from the public education system.[24] Both held that such a regulation is arbitrary and capricious, and hence not within the discretionary powers granted by the States to the particular school boards.

The Federal Constitutional issue was not raised in these cases. However, there is a high probability that a regulation arbitrary and capricious and therefore declared void under State law would suffer the same fate under Federal law.[25] Moreover, the School Segregation Cases[26] in 1954 clearly brought out that the Supreme Court considered public education a right of primary constitutional dimensions. An unanimous Court forcefully stated: [27]

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[24] Nutt v. Board of Education, 128 Kan. 507, 278 Pac. 1065 (1929); McLeod v. State, 154 Miss. 468, 122 So. 737 (1929).

[25] When personal rights or liberties are concerned, the U. S. Supreme Court seems more inclined to question State legislative policies than State courts. See Bates v. Little Rock, 361 U.S. 516 (1960); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958). When economic or property rights are at issue, the Supreme Court is less inclined to question State legislation than State courts. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Day-Brite Lighting Co., Inc. v. Missouri, 342 U.S. 421 (1952); Lathrop v. Donahue, 367 U.S. 820 (1961). But see Western Union Telegraph Co. v. Pennsylvania, 308 U.S. 71 (1961).

[26] 347 U.S. 483 (1954).

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democractic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

If the Supreme Court considers education this important, may school authorities deny education to persons without an important reason? In other words, the public goal sought by excluding married children from school must be high on the societal value scale because a denial of secondary education in contemporary society is a very serious deprivation. Without a high school education today's teenager will be the functionally illiterate person of the future. [28] Moreover, if a teenager's abilities are not even minimally developed, future America will lose a resource base, to say nothing

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[27] Id. at 493.

[28] Functional illiteracy is a relative term. Today it circumscribes those persons who have had some formal education, but less than five years. As the term itself implies, it denotes persons who can read and write, but cannot do so at a level to make those skills economically useful.

As the minimum communicative skill requirements for employment are raised, so will the level of functional illiteracy. See U. S. Department of Labor, Bureau of Labor Statistics. Occupational Outlook Handbook, about the prospect of him becoming a public charge. [29]

A. Marriage as Grounds for Suspension of Students

> Married students may return to school if they maintain proper behavior and not get smutty in talking to other children.
>
> [Topeka, Kansas]

* * * * *

> Married students may attend school for studies only as long as they are prudent and pregnancy is not discernible.
>
> [Bridgeport, Texas]

* * * * *

> Married students automatically are suspended upon acquisition of such information. Reinstatement only by school board after full hearing of all factors.
>
> [Covington, Rhode Island]

And for the lover of drawing lines:

> Girls are required to leave soon after marriage. Boys can finish if good students. Normal activities as usual are allowed while in school.
>
> [Salt Lake City, Utah]

Often school systems will temporarily suspend young marrieds from school upon discovery of their marriage. The duration of suspension may be merely the time it takes to make a special application for readmission

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Washington, D.C., Government Printing Office, 1961, p. 29.

[29] A study of relief recipients in Chicago posited that the problems of public welfare were principally attributable to a lack of competitive educational skills. (The Cook County relief expenditures in the year of the study amounted to $16.5 million.) New York Times, Sept. 22, 1962, p. 27.

to the principal[30] or the school board.[31] Again, it may be of a fixed duration such as two weeks,[32] one semester,[33] or a complete year.[34]

School authorities temporarily suspend married students in an attempt to preserve school morality. This is clear from their attitude on the married student question in general. The basic assumptions appear to be that in the first year of marriage, "the marriage relation brings about views which should not be known to unmarried children; that a married child in the public school will make known to its associates in school such views, which will, therefore, be detrimental to the welfare of the school."[35]

Quite clearly the leitmotiv in these regulations is that married students are likely to corrupt unmarried students, especially during the first months of marriage.[36] Is this a reasonable assumption? The courts are divided

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[30] Temperance, Michigan

[31] Augusta, Georgia.

[32] Boonesville, Arkansas.

[33] Hannibal, Missouri.

[34] Clarksville, Tennessee.

[35] McLeod v. State, 154 Miss. 468, 469, 122 So. 737, 738 (1929).

[36] One written school policy articulates this fear:

> Married Students: (1) The students, if attending LaGrange Public Schools when married, must drop from school for one month, because it is believed that married students' presence in the school immediately following the marriage has an adverse effect

on the question. In two cases when school authorities wanted to permanently exclude students because their marriage would adversely affect the morals of the single students, the courts prevented them.[37] Indeed, one judge asserted:[38]

> Marriage is a domestic relation highly favored by the law. When the relation is entered into with correct motives, the effect on the husband and wife is refining and elevating, rather than demoralizing. Pupils, associating in school with a child occupying such a relation it seems, would be benefited instead of harmed. And, furthermore, it is commendable in married persons of school age to desire to further pursue their education, and thereby become better fitted for the duties of life.

But these cases stand alone. No other reported case holds that married students are a beneficial influence on their single classmates. All the remaining cases which consider the issue hold that married students do adversely affect the minds and mores of their single classmates.[39]

> on the morale and efficiency of the school. (2) The married student will not be permitted to participate in any school sponsored activity. (3) The married student will be asked to drop from school when it is felt that the student hinders the morale and efficiency of the school system.

[37] Nutt v. Board of Education, 128 Kan. 507, 278 Pac. 1065 (1929); McLeod v. State, 143 Miss. 468, 122 So. 737 (1929).

[38] McLeod v. State, 154 Miss. 468, 470, 122 So. 737, 738-9 (1929).

[39] Thompson v. Marion County Board of Education, 202 Tenn. 29, 302 S.W. 2d 57 (1957) (suspension for remainder of semester upon marriage upheld); In re Rogers, 234 N.Y.S. 2d 172 (1962) (15 year old wife should not be compelled to attend school because of possible "harmful effects" on her classmates); Kissick v. Garland Independent School District, 230 S.W. 2d 708 (Tex. Civ. App. 1959) (married boy may be excluded from class offices

The division of authority here does have a distinguishing feature. All of the cases which rule against married students involve regulations which do not exclude these students from classes, but from co-curricular or extra-curricular activities. The cases which hold for the married students involve regulations which excluded them from classes either permanently, or for one year. Several different conclusions may be drawn from this phenomenon. One is that State courts basically may differ as to whether married students promote or detract from the moral ten~~re~~or of the school. Another is that courts are unwilling to deprive persons of an education because they get married, and after reaching this decision, merely turn the morality argument of the school authorities against them as a makeweight. Thirdly, judges may agree with school authorities that married students do adversely affect the morals of their single classmates. However, these judges may balance the equities between the parties, and conclude that young marrieds may be deprived of some school benefits in the interests of morality, but may not be deprived of all or the most basic school benefit, an education.

In one of the two reported cases in temporary suspension because of marriage, the court upheld the school authorities. The case, State v. Marion County Board of Education,[40] emphasized that every high school principal

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and athletics) Cf. State v. Gans, 168 Ohio 174, 151 N.E.2d 709 (1958).

[40] 202 Tenn. 29, 302 S.W.2d 57 (1957). The other and later case ruled against the school authorities. Board of Education of Harrodsburg v. Bentley, 383 S.W.2d 677 (Ky. 1964) (one year suspension held to be an abuse of discretion).

in the school district had testified about their experiences with newlywed students before the school board passed the regulation. These principals uniformly stated that married students "for a few months immediately following marriage, have a detrimental effect upon the progress and efficiency of the school". The court concluded that the regulations had some foundation in fact, and, as a consequence, were within the discretionary power of the board of education.

The regulation in question provided that upon marriage a student was expelled for the remainder of the current school term. If the marriage occurred during the summer recess, the student had to remain out for the next school term.[41] The court permitted this regulation to be applied to an eighteen year old girl who was only three months away from graduation.

The case rests right at the edge of the Constitution. The regulation does not provide for home or adult instruction. It simply throws married children out of school for one half year, a very serious loss to them. What can the expelled couple accomplish in the half year hiatus? What type of employment can the bread-winner secure if he intends to return to school within six months? On the other hand, is it realistic to assume that the husband, after securing some kind of employment, will, or can, quit after six months? The possibility of pregnancy for the woman completes a very bleak picture of the possibility of a return to the high school by either spouse.

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[41] Theoretically, if a student were married on the last day of school, he would lose academic credit for the whole semester. Conversely, if a student married one day later, he would receive no education for months. Again, if a student married two days before the end of the fall semester, he would only remain out of school for two days, but if he married on the first day of the spring semester, he would remain out of contact with other students for nine months. Inflexible use of this regulation, especially in the former instance, would not prevent married students from association with their former classmates, and would only expunge their grades for one semester.

The probable consequences of a one term expulsion are all important. They place the regulation in perspective, because pragmatically a one term expulsion may affect permanent expulsion for most young marrieds. If it does, it probably contravenes the Fourteenth Amendment.

This discouragement-index may be applied to test the permissible duration of all marriage-based suspensions. At one pole, a suspension of two weeks, or even a month, may make no appreciable difference in a decision by newlyweds to remain in school or not. At the other extreme, a suspension for one year may well guarantee permanent withdrawal.[42] A duration of suspension which would probably cause permanent withdrawal may well be unconstitutional.

B. Marriage as Grounds for Transfer of Students to Adult Classes

> Students who marry are withdrawn from the regular program and given an opportunity to complete their high school education in the adult evening school. No charges are assessed and a complete curriculum is provided.
>
> [Brigham City, Ohio]

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[42] The only other, and later, case in suspension of married students did not consider the Federal Constitutional issue. Nevertheless, the court held that a one year suspension was an abuse of the rule making power of the Board of Education, Board of Education of Harrodsburg v. Bentley, 383 S.W.2d 677 (Ky. 1964).

Larger school districts which operate adult education courses often require or encourage[43] married students to transfer to these courses. If married students are disruptive of school decorum and morality during the first several months of marriage, transfer to adult classes is constitutional. In fact, the transfer provides the continuity of education not available if they are simply suspended.

A transfer of married students to adult or evening classes for a short duration - that period in which marital adjustments may affect other students - may be justified. Administrative difficulties of retransfer, coupled with the educational values of minimum uprooting, are considerations which support the continuance of married students in adult classes. Secondly, the married students are in fact receiving the principle state benefit, an education.

There are no reported decisions on the subject of transfer, but the cases upholding the power of school authorities to deny married students the privilege of participating in co-curricular or extra-curricular activities, would support permanent transfer.[44] The only deprivations (except social) married students suffer when placed in adult classes are the extra-curricular functions of the school, assuming that the time of graduation is not substantially postponed.

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[43] The line between encouragement and demand is blurred. A school official in Orlando, Florida reports:

> When students marry, they are requested to transfer to the adult school, and if this choice is not made and they get out of line in any way, a suspension is made which usually results in their transfer.

And in Denver, Colorado:

> Married students may have any or all activities limited, reduced, or suspended. Each is considered on an individual basis.

C. Marriage as Grounds for Excluding Students from School Activities

> Recently considerable concern has been expressed to the Board of Education relating to the influence of married students attending school with other students. Since occasionally married students have become prominent members of athletic teams and have held student body and class offices, a kind of glamour might be associated with such a marriage which may have the effect of lending encouragement to young marriages. Furthermore, when students assume the responsibilities of marriage and parenthood, they represent a different culture and maturity from those of the unmarried students. As these students move from the society of the single to that of the married, their new social interests and change of life patterns are so drastically different as to make it seem unwise and incompatible to leave them in positions of leadership among the unmarried students. Such time as they have free from their studies should logically be used in home-planning and income-earning responsibilities, instead of being involved in the activities with unmarried members of the student body.
>
> * * * * *
>
> The Board of Education hereby resolves that no married student shall be permitted to participate as a student body or class officer, on athletic teams or in those extra-curricular activities which are

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[44] Starkey v. Board of Education, 14 Utah 2d 227, 381 P.2d 718 (1963); State v. Stevenson, 27 Ohio Op.2d 223, 189 N.E.2d 181 (1962); Cochrane v. Board of Education, 360 Mich. 390, 103 N.W.2d 569 (1960); Kissick v. Garland Independent School District, 330 S.W.2d 708 (Tex. Civ.App. 1959).

> separate and apart from the regular daily class schedules and expectations for graduation requirements. . . .
>
> * * * * *
>
> It is further understood that if any married student fails to conform to the proper standards of citizenship he or she may be dismissed immediately.
>
> [Davis County, Utah]

Exclusion from some or all school activities is the most popular regulation of married students. The degree of exclusion varies[45] as does the nature of the forbidden activities.

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[45] Married Students may attend school; however, they are on probation for the equivalent of one semester. Probation means that they may not engage in any activity which performs before the public.

[Yerrington, Nevada]

Certain activities are denied married students. Cheerleader, student body officer, would be examples but extent of participation in extra curricular activities depends upon the individual case. Usually it is discouraged.

[Roseberg, Oregon]

There are no regulations limiting the activities of married students. Imposition of such restrictions in our judgment implies disapproval of matrimony and the setting up of second class citizenship for married students. This we do not do.

[Affton, Missouri]

And, less articulate, but with no less feeling:

Married students are usually restricted from all extra curricular activities in most schools. In other schools in the area they are treated as human beings.

[Kalamazoo, Michigan]

Cf. State v. Stevenson, *supra* note 2, which drew a line between permitted underage marriages and full age of consent marriages. The school authorities had the power to punish underage marriages by excluding the children involved from extra-curricular activities.

To quote a few:

> They may not work for honors.
> [Bridgeport, Texas]

* * * * *

> [Married Students] are not permitted on activities such as athletics, music contests, school newspaper, annual staff, etc.
> [Columbia Junction, Iowa]

* * * * *

> Married students will not be permitted to participate in any extra curricular activities, public performances, or commencement exercises.
> [Laramie, Wyoming]

Regulation of married students has changed in the last several decades. The new emphasis on education is responsible for the new attempts to compel married students to attend school[46] -- no longer are they peremptorily dismissed.[47] On the other hand, school authorities recognize that early marriages limit educational possibilities. As a consequence, boards of education feel it is their responsibility to prevent early marriages of teenagers within their aegis. The weapon they adopt to discourage teenage marriages is to forbid married students from taking part in school activities. Their reasoning proceeds as follows: (1) teenagers tend to emulate their talented peers; (2) if married students have an opportunity to display social graces, athletic prowess, or academic excellence, their unmarried associates will attempt to emulate them; (3) the manner in which single students will emulate married students will not be to strive for athletic prowess, the social graces, or academic excellence, but they will marry and; (4) then drop out of school.[48]

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[46] The Handbook on New York State Educational Law (1962 revision) states:

> 7:28 Is a pupil under sixteen years of age who marries subject to the compulsory education law?
>
> Yes.

But see In re Rogers, 234 N.Y.S. 2d 172 (1962).

[47] See pp. 79-80, supra.

Despite this legion of assumptions, three courts have upheld these regulations,[49] and one has deadlocked.[50] In each case the married students urged the Fourteenth Amendment, arguing that the exclusionary rules were arbitrary and unreasonable. In all of the cases the plaintiffs were star athletes whose chances for college scholarships would be seriously jeopardized if they were excluded from competitive sports. Nevertheless, the courts held that the regulations were within the sound discretion of the school administrations.

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[48] This is the reasoning more or less articulated in official statements of board policies. However, an undercurrent of a different reason courses through many statements, belying the official position. One gets an impression that several school authorities feel it their role to discourage early marriages principally because early marriages are disfavored in the community.

Weigh the statement of this school administration from Maine:

> All minors under 21 years of age are entitled to a public school education in Maine and they are not denied this. Marriage is not an offense against the law in Maine, nor is it an offense for a married woman to become pregnant; therefore, the school has no choice but to admit such students to full privileges.

This opinion is not uniformly held. Many professional educators feel very deeply to the contrary.

Try:

> Under Missouri law, marriage has been clarified as a situation honorable in character. The school's philosophy is that two classes of school experience cannot be provided. The right of admission to school carries with it the right of full participation in school.

Although prevention of early marriages is the touchstone of married student regulation, other grounds have been proffered. One is the familiar morality argument. Married students must be prevented, in the words of one administrator, from "telling the other kids what they are missing." Or in the words of another schoolman, "Married students may attend classes; but cannot participate in any of the extra-curricular activities (they have been designed for kids and married people are not kids)."

Certainly excluding married students from all school activities, save the classroom, does reduce school sponsored discourse between married and single students. But do these regulations actually prevent undesirable communications? The lunch table and the school bus provide better forums for sex discussion than formal or school directed activities. [51] Isn't there a high probability that sex discourses, if they are going to be held, will in fact be held anyway? If this is true, aren't exclusionary regulations ineffective and thus invalid--at least insofar as they are based on a morals argument? [52]

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[49] Starkey v. Board of Education, 14 Utah 2d 227, 381 P. 2d 718 (1963); State v. Stevenson, 27 Ohio App. 2d 223, 189 N.E. 2d 181 (1962); Kissick v. Garland Independent School District, 330 S.W. 2d 708 (Tex. Civ. App. 1959).

[50] Cochrane v. Board of Education, 360 Mich. 390, 103 N.W. 2d 569 (1960), a three-one-three decision by the Michigan supreme court, one justice maintaining that the case was moot because the plaintiffs had graduated. The lower court had upheld the school board, and the tied verdict by the appellate court let the lower court decision stand.

Limiting the school activities of married students has been hung on still a third peg--that married students jeopardize the establishment of their new home by taking time to participate in extra-curricular activities.

In the words of a Yakima, Washington, school officer, "Married students may attend but since marriage is an adult family responsibility, participation in school activities is discouraged." In this district activities are only discouraged. Many districts do not give the young adults a choice, but merely tell them what is best for their marriage. The courts have given scant consideration to this ground for exclusion. Perhaps the judges see some inconsistency between a school system calling the young marrieds "adults" and then assuming an in loco parentis role by telling them what is best for their marriage.

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[51] Several school districts, at least inferentially, have provided for this possibility. These districts simply schedule the married students' classes in the morning only, and then send them home. This provides maximum insularity between married and single students.

[52] The cases have not seriously considered the morality reasons of exclusionary regulations. The prevention of dropouts apology has been the focus of judicial analysis. Cf. Cochrane v. Board of Education, 360 Mich. 390, 103 N.W. 2d 569 (1960).

Over all, the exclusion of married students from school activities may withstand constitutional attack in the future as it has in the past. But the reason rests in the nature of the exclusions and not in whether or not they are arbitrary. More specifically, for the average married student, exclusion from gym or sports or glee club is not a great deprivation - in most cases it is a welcome regulation. Consequently, the harm in these cases is so trivial as to rend the deprivations de minimis, or at least, not of constitutional dimensions.[53] For example, a school system which excludes married students from commencement exercises cannot justify the regulation on reasons of school morale, or discouragement of dropouts, because commencement terminates the school career of the single classmates of the married couple. Nevertheless the regulation, which is pure punishment, may remain constitutionally to unlitigated because it is such a small loss to the students involved.[54]

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[53] State courts in this instance are the only avenues of relief. There the regulations may be struck down as arbitrary, and consequently, an abuse of discretion by school officials.

[54] In Frank v. Maryland, 359 U.S. 360 (1958), the Supreme Court permitted the State of Maryland to levy a fine of twenty dollars if a person refused to admit a health inspector into his home. In a later case the Court divided 4-4 (one justice abstaining) on an ordinance prescribing a fine of twenty or two hundred dollars, and/or two to thirty days in jail for refusal of a home health inspection, Eaton v. Price, 364 U.S. 263 (1959). In both of these cases the Court appears to be assessing how much the constitutional right of privacy may be taxed by a State.

See also Yick Wo v. Hopkins, 118 U.S. 356 (1885) (reversal of a conviction levying only a $10 fine, but possible future deprivations to the defendant); Thompson v. Louisville, 302 U.S. 199 (1959) (reversal of a conviction in a police court which levied fines of $10 each on two counts.)

Conversely, a student may be able to prove severe losses if he is denied the right to compete in certain activities. Scholarships based on sports or musical ability certainly are jeopardized, if not lost, when a talented student is excluded from participation. Indeed, few other pre-college forums are available to display scholarship talents. Excluding talented, or may be talented, married students from functions which may be a road to college education would appear to be unconstitutional, although the State cases which have considered this point have upheld the school authorities.

Other regulations are calculated to make an example of the young marriage. These may very well be constitutionally defective. To use the State power to segregate children because of their racial background is now clearly unconstitutional because it subordinates the sense of human dignity of the Negro children "in a manner that may affect their hearts and minds in a way unlikely ever to be undone." Would not the same be true of married teenagers, who in effect are being told their marriage is morally tainted, and as such disqualifies them from associating with their still-uncorrupted single friends? The Supreme Court in America's hyper-regulated society has appeared increasingly devoted to bulwarking human dignity against State arbitrariness. In this new role it appears that the court would be inclined to declare void regulations designed to punish the young marriages.

D. Pregnant Students

> We are a junior high school, grades 7, 8 and 9.

> We have relatively few married students. They are usually expectant mothers, and by the time they are married, the pregnancy shows. The student drops out of school and may return after having the baby. When the pregnancy is known by us, it usually shows, and there is no trouble in withdrawing the student. We would not allow any participation in extra-curricular activities if a couple were married and pregnancy would not be involved - but we have never had such a case either.
>
> [Casper, Wyoming]

What do school systems do when they discover one of their married students pregnant? As may be expected, there is an irreconcilable variety of regulations. All suspend the expectant mothers, but disagree as to the proper time. Some systems suspend immediately upon discovery of the pregnancy. Other systems require the pregnant student to withdraw in the third, fourth, fifth, sixth, seventh or eight month of pregnancy. Still other systems, less chronologically secure, suspend the student when the pregnancy becomes obvious. And other schools report that "Every effort is made to retain students in school to a time the expectant mother and/or her doctor recommend absence for maternity."

A girl dismissed because of pregnancy will probably miss a complete year of school. Moreover, after having a child, the onus of motherhood will probably prevent her returning to school. Considering these factors, an early dismissal because of pregnancy may cause serious educational loss. For example, if a girl discovers she is in the second month of pregnancy when she is two months away from the end of her second semester, she will have to drop out of school, and wait one or two years before she can complete that semester. One school board differentiates between seniors and under classmen in this respect, and provides:

> That a Pregnant Girl:
>
> (a) Shall, if an underclassman (not a senior), be permitted to remain in school no longer than the remainder of the week, after verification by the girl's admission or a doctor's statement that she is pregnant.
>
> (b) Shall, if a first semester senior, be permitted to remain in school until the end of the semester, if the pregnancy is substantiated during the second six-weeks' period of the semester. If the situation is discovered during the first six weeks' period, she may remain in school no longer than the remainder of the week.
>
> (c) Shall, if a second semester senior, be permitted to remain in school until all graduation requirements are met, provided there is no anatomical change in evidence. However, if the school superintendent and/or the high school principal rule that an abnormal situation is being permitted, then the girl will be withdrawn from school at the end of the week in which such decision is made.

The just quoted policy reluctantly recognizes the hardships inherent in early dismissal of pregnant girls. Nevertheless, the policy ruthlessly cuts short the education of undergraduate girls.

There seems to be no justification for dismissing pregnant girls before the pregnancy is clearly apparent. What educational goal is promoted in so doing? Can an unapparent pregnancy embarrass either the prospective mother or her classmates? Is there any danger to the health of the mother-to-be? No. Nevertheless, State v. Chamberlain,[55]/ the only reported decision on dismissal of pregnant students, upheld a board of education's dismissal of a girl in the early unapparent stages of pregnancy. The facts of the case, however, severely undermine it as precedent. There the girl had (1) withdrawn and not filed suit until three months later; (2) received home instruction and full credits in all of her courses; and (3) when the case was finally heard, had reached a stage of pregnancy that made reinstatement in classes unjustifiable - the case was moot.

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[55] 175 N.E. 2d 539 (Ohio Com. Pl. 1961).

The peculiar facts of the Chamberlain case make it worthless as precedent. The court attempts to do only what it could do - that is to justify a fait accompli. As such, it agonizes through three-plus pages of casuistry to preserve some residual respect for the school board.

Putting the Chamberlain case aside as unique, a dismissal of a married student from school before her pregnancy is obvious is probably unconsitutional. The dismissal will be severe educational loss to the girl and there is no offsetting educational purpose for it. The real motive behind these regulations seems to be an inchoate, or at least unarticulate, fear that pregnancies will become popular with the other students if once they are condoned within the school walls. This reason is often carelessly couched in terms of protection of school morale and discipline.

In the fifth month of pregnancy, at which time the expectant mother's condition may become obvious, dismissal may be justified. However, the justification would be grounded in considerations of the mother's health. Gym and other school activities may entail rough physical contact.

Consequently, an expectant mother should not be included in physically demanding activities. Carrying this premise further schools may be able to legally justify total exclusion, postulating that the everyday bustle and jostle of high school life endangers the health of both mother and child after the fifth month of pregnancy.

E. Unwed Mothers

> Our experience has been with unwed expectant mothers. In this case the counselors talk with them and suggest that they leave school, which in most cases they do.
>
> [A Tennessee School System]

Unwed expectant mothers may be regulated much more severely than married expectant mothers. The unwed mother has been guilty of an immoral relationship. Moreover, the relationship is one which may or may not reflect on the school itself as an educative and moral teacher. At any rate, because the unwed mother has evinced some tendency to immorality, school authorities may shield their other charges from her influence. Indeed, a Kentucky Department of Education official reports, "It is our opinion that an unmarried mother can be prevented from attending school on the grounds of gross violation of propriety and law."

Although understandably untested, a regulation which suspends unwed mothers upon discovery or publication of the pregnancy is probably constitutional. The extra-marital pregnancy itself supplies sufficient evidence for a school to conclude that the girl may be an immoral influence on the school system, and be justifiably excluded until the child is born. One can disagree with such a regulation arguing that this one misstep does not justify a loss of a year or more of education, especially if the girl herself may be the sole source of support for the child. Another argument can be made that a pregnant unwed mother is a healthy influence on a system insofar as her unenviable circumstances may serve as a caution to her classmates.

Whatever the arguments against the wisdom of immediate suspension of unwed mothers, the suspension is legal. Courts will not interfere with a regulation of a school board if it has some reasonable basis. The crux is not whether all reasonable men would agree with the regulation, but whether some reasonable men could. Cast in this form the regulation is valid.

F. Unmarried Fathers

> Admitted or court proven fathers must drop out of school for the remainder of the semester, plus one additional semester, to make the adjustments which go with the change in their social status.
>
> [Palmyra, Wisconsin]

Schools may regulate putative fathers under the same source of power as they could regulate unwed mothers. The school may protect its charges from immoral influences, and students who have caused a pregnancy (whether the mother be another student or not) have at least evidenced a tendency to immorality. Consequently, these students' associations with other students in school activities may be limited.

Vandenburg County, Indiana excludes putative fathers from athletics. The authorities reason that success in athletics puts a boy with proven immoral tendencies in a sexually exploitable hero role.

There must be a clarification of the goals sought by regulating unmarried fathers. There seems to be two. The first is to protect other students from the association or influence of a student who has manifested the ability to commit a serious breach of the communal moral code. This reason would justify limiting the student to formal class sessions, and other closely directed activities. It would also justify excluding the student from athletics or other programs which would allow adulation and the accompanying influence over other students.

Conversely, the immoral-influence reason would not justify suspension of the student. His influence will not be abated by a year's absence - it would merely be postponed. Consequently, a suspension would be an arbitrary regulation, because it would not effect the goal sought.

Suspension may be justified on another legitimate ground. That is the power of the school to discipline students who have been guilty of immoral conduct in the school or associated with school activities. If the student is responsible for a pregnancy which developed on a school sponsored trip or activity, he may be disciplined by expulsion or suspension. Analytically he is being punished not because he caused a pregnancy but because of an immoral act, which reflects on the school. Carrying this analysis further, it would appear that if the pregnancy was not connected with a school activity, the father could not be punished.

III. CONCLUSION

The conclusion to this article really lies with the reader, be he a school official or private citizen. The community and the schools must clarify attitudes toward the domestically involved student. School regulations, felicitiously labeled as promoters of morale or discipline, need realistic appraisal. If the appraisal reveals motives of punishment or simply bluenose disapproval of teenage marriages, they cannot stand. School administrations owe a duty to married as well as single students. School administrators are educators, and not the representatives of community puritanism.

Even more critical to any conclusion about high school marriages are the implications as regards the integrity of school administrators and boards of education, should either continue to enforce myth dominated rules out of fear of public reaction to more realistic regulations.

Finally, private citizens may have a moral duty to protect the young marrieds, their fellow citizens. Indeed, as Chief Justice Warren recognized, justice can be achieved only if those people not directly affected by a wrong are just as indignant about it as those who are personally hurt.

CHAPTER VI

CHILDREN'S HEALTH: RESPONSIBILITY OF THE SCHOOLS OR THE PARENTS?

Can the State make you clean your teeth? Can it make you take a bath? Quite clearly no, but equally as clearly a State may quarantine its diseased citizens and their associates. And when the sanitary conditions in a particular house deteriorate to an extent that they threaten the health of neighbors the State may step in. [1]

The exact dimensions of a State's power to regulate the health habits of its citizens have not been drawn. On the other hand, two principles have become firmly established. One is that the police power of the State embraces the power to protect the health of its citizens, and while exercising this power a State may limit the personal freedom of citizens (*e.g.* by quarantine) or invade the bodily integrity of citizens (*e.g.* by vaccination). A countervening principle to the police power of the State is that there is a "sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution to interfere with the exercise of that will."[2]

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[1] Indeed, officials may demand entry to suspected pestilential dwellings without a search warrant. In so holding, the Supreme Court said:

> The need to maintain basic minimal standards of housing, to prevent the spread of disease and that pervasive break down in the fiber of the people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government.
>
> Frank v. Maryland, 359 U.S. 360, 370 (1952).

Even one that isn't reasonably suspect.
Ohio ex rel. Eaton v. Price, 364 U.S. 263 (1960).

Obviously, these principles do not supply answers to specific questions of how far the police power of the State may invade or limit the actions of individual members. However, the principles do articulate the considerations which must attend any judgment whether to regulate or not to regulate the judgment of how far the general welfare of the community can justify encroachments on the personal liberties of the individual.

I. THE PRECEDENTS

> The Connecticut Supreme Court of Erros has upheld the right of law to require vaccinations in the case of Bissell v. Davidson, 65 Conn. 183 (1894).
>
> * * * * *
>
> If parents refuse to permit their children to be vaccinated, school authorities may exclude the children from attendance; but two possible results may ensue:
>
> 1. The parent may be convicted for violation of the compulsory attendance law, or
>
> 2. The pupil may be adjudged a "neglected child" and committed to a children's home.
>
> [Connecticut State Department of Education]

The Supreme Court early in the twentieth century held that a compulsory vaccination ordinance of the City of Cambridge, Massachusetts did not violate the freedom of the person guaranteed by the Fourteenth Amendment.

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[2] Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905).

The case, Jacobson v. Massachusetts,[3] rejected the contention that the Fourteenth Amendment provides an absolute right for every citizen to care for his own body and health in such way as to him seems best, stating:[4]

> In every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

The facts of the Jacobson case strongly supported the municipality's position. The disease was the highly mortal smallpox, and it had been prevalent in the community and was actually on the increase at the time the regulation was enacted. Moreover, the objecting citizen did not dispute the vaccination on religious grounds, nor did he prove that the vaccination would cause him serious injury. He merely claimed that under no conditions could a State vaccinate him.

The decision in the Jacobson case appeared to restrict the right of the State to vaccinate citizens only in areas threatened by epidemic. This apparent restriction was removed almost two decades later in Zucht v. King.[5] This case considered an ordinance of San Antonio, Texas prohibiting any child who was not vaccinated from enrolling in any institution of learning, public or private. The complaining parents asserted that there was no epidemic, and none was threatened, and therefore the ordinance was unreasonable.

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[3] 197 U.S. 11 (1905).

[4] Id. at 29.

[5] 260 U.S. 174 (1922).

The decision, written by Justice Brandeis, virtually turned over the whole question of vaccination, and indeed all health controls, to the States. The opinion said that the Jacobson case had settled once and for all that a State has very broad discretion in matters affecting the application and enforcement of a health law. Whether or not Justice Brandeis was correct in his interpretation that the Jacobson case clearly put to rest all constitutional objections to State vaccination policies is not important. What is significant is that the Supreme Court in the Zucht case said that a State had wide discretion in health matters and could enforce health regulations in the schools.

After the Zucht v. King decision handed the health ball to communities in general, and schools in particular, the local officials ran with it. Today schools across the nation require as a condition of school attendance, inoculations for smallpox, chicken pox, poliomyelitis, diptheria, pertussis and tetanus. [6] Moreover, gyanastics and other health instructions are required for graduation in many instances, and dancing and archery are said to promote the health and morals of communities. Do the smallpox decisions of several decades ago really support all of today's scholastic health programs? And if some of the contemporary health regulations will not withstand constitutional attack, which ones will not?

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[6] On the other hand, one Iowa school district explained that it had no requirement of vacinnations, modestly commenting: "A community of our size and wealth doesn't have a need for this."

Now to contrast actual practices with the law.

II. CONSTITUTIONALLY SOUND REGULATIONS

> Vaccinations are required (smallpox) by a local ordinance. No exceptions. Rather stupid, perhaps, but we haven't had any serious trouble, i.e. no strong resistance.
>
> [Name of School District Withheld]

The schools have the right, if not the duty, to protect the children placed in their charge. Flowing from this right is the power to require vaccination of each child to prevent the spread of contagious diseases.

Religiously based objections to this power have been uniformly unsuccessful as the courts have consistently recognized that religious freedom, like all freedoms, is not absolute.[7] The boundaries of religious freedom are the points where the exercise of religion by one citizen endangers the health and morals of other citizens. Freedom of religious thought is absolute, but freedom of religious action is not.[8]

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[7] Pierce v. Board of Education, 30 Misc. 2d 1039, 219 N.Y. Supp. 2d 519 (1961); Board of Education v. Mass, 56 N.J.S. 245, 152 A. 2d 394 (1959); Anderson v. State, 89 Ga. App. 259, 65 S.E. 2d 848 (1951); Dunham v. Board of Education, 99 N.E. 2d 183 (Ohio 1950); Cude v. State, 237 Ark. 927, 377 S.W. 2d 816 (1964).

[8] The Supreme Court charted the extremes of this action in U.S. v. Reynolds, 98 U.S. 145 (1878), stating:

Laws are made for the government of actions, and while they

The only constitutionally required exception to compulsory vaccination regulations arises when the health of the subject will be seriously affected. The school may not demand that a child risk death or permanent disablement as a condition of attending school. But what kinds of evidence must a child furnish to prove his particular allergy to a specific inoculation? In the Jacobson case,[9] decided back in 1905, the Supreme Court was confronted with a citizen who proved that, as a child, he had suffered from a disease caused by a vaccination, and that his own son had similarly suffered. The Court held that the citizen had not proved at the time of the current vaccination that he was not a fit-subject for immunization, and consequently the citizen's defense could not stand.

How should school officials administer an immunization program so as to be free from constitutional challenge? The easiest way is to hold the parents or guardians of the children responsible for procuring the requisite immunizations (allowing, of course, exceptions for health reasons).

If the school system itself undertakes to immunize students it takes on an added responsibility - i.e., to take reasonable precautions that no child is allergic, or will react severely, to particular medication. Clearly,

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cannot interfere with mere religious belief and opinions, they may with practice. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? Id. at 166.

[9] 197 U.S. 11 (1905).

within this ambit of reasonable care is the duty to ascertain from parents or guardians whether particular children will react adversely to the proposed ministrations.

The foregoing discussion centered on regulations which protect the community generally, and school children particularly, from contagious diseases. The basic justification for these regulations is that an individual may not endanger the health of his fellow man even though he may find the regulations personally or religiously abhorrent. All scholastic health regulations are not geared to this end, however. Tetanus innoculation, a commonly required vaccination, cannot be justified as protective of the community welfare.[10] Nor can physical fitness programs or personal hygiene classes be rationalized as public welfare measures. To support these rules, other legal doctrines come into play.

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[10] At least not in the sense that smallpox vacinnations are. Tetanus innoculations may be said to protect the community welfare because they protect individual children who are members of the community. This logic could support the State doing anything to anyone under the guise of promoting the community welfare. In fact, the floridation cases have used this logic to uniformly uphold placement of chemicals in a community water supply to reduce dental decay in children. City of Fort Pierce v. Altenhoff, 143 So. 2d 879 (Fla. 1962); Wilson v. City of Council Bluffs, 253 Iowa 259, 110 N.W. 2d 569 (1961); Ready v. City of St. Louis, 352 S.W. 2d 622, App. dismissed per curiam 371 U.S. 8 (1962) (Mo. 1961); Teeter v. City of LaPorte, 236 Ind. 146, 139 N.E. 2d 158 (1956); Baer v. City of Bend, 206 Ore. 221, 292 P. 2d 134 (1956); Kraus v. City of Cleveland, 163 Ohio 559, 127 N.E. 2d 609 (1955); Froncek v. City of Milwaukee, 269 Wis. 276, 69 N.W. 2d 242 (1955); Karl v. City of Chehalis, 45 W. 2d 654, 277 P. 2d 352 (1954); Dowell v. City of Tulsa, 273 P. 2d 859 (Okla. 1954), cert. denied, 348 U.S. 912 (1954); Chapman v. City of Shreveport, 225 La. 859, 74 So. 2d 142 (1954); DeAryan v. Butler, 119 Cal. 674, 260 P. 2d 98, cert. denied 397 U.S. 1012 (1953). Cf. Auchter, "Floridation: A Study of Philosophies," 46 A.B.A.J. 523 (1960).

Several but not all of the regulations in this genre may be supported by the parens patriae, or alter parent, role of the State. Basically this doctrine dictates that the State has a right to provide for those citizens unable to provide for themselves. This State function is seen most clearly in State care for the mentally and physically infirm and for orphaned minors. But even when children do have parents able to care for them, if the parents neglect the children, the State may interfere.[11]

The doctrine of parens patriae raises little dissent in instances where parents totally ignore their children's welfare - the State may certainly intercede. There is virtually no dispute at this juncture. Constitutional conflict occurs, however, when parents are conscientiously providing for their children, but in a manner declared wrong, or neglectful, by the State. The actions of Christian Science practitioners bring this area into focus. For example, an Illinois court was confronted with the issue of whether a transfusion could be ordered to save the life of a child of Christian Science parents who objected to the transfusion on religious grounds. The court held that the State could interfere in its role as parens patriae.[12]

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[11] In fact parental care, heartfelt and sincere as it may be, can be punished as criminal neglect if it does not accord with the State's concepts of proper care. In re Whitmore, 47 N.Y.Supp.2d 143 (1944).

[12] Wallace v. Labrens, 411 Ill. 582, 104 N.E.2d 768 (1952). See also, In re Clark, 21 Ohio 2d 86, 185 N.E. 2d 128 (1962) (An emergency order authorizing blood transfusions for a severely burned three year old child was issued despite the objection of the parents, Jehovahs Witnesses, on religious grounds. ". . . a child's right to live and his parents' religious belief collide, the former is paramount, and the religious doctrine

How does the doctrine of parens patriae apply to education? Instances of life or death decisions are rare in school administration. But most schools conduct day-to-day health programs, hygiene and physical education classes, and occasional dental and visual examinations. Does the doctrine of parens patriae give an absolute right to schools to go this far in the care of children? Or must school officials recognize religiously-based objections by parents to certain health regulations, and if so, which ones? The following are the most common problems.

A. Emergency First Aid

> . . . [L]egal duty can be said to exist when a reasonable man having the knowledge of facts known to the teachers . . . would recognize a pressing necessity for medical aid, and the dictates of humanity, duty and fair dealing would require that there be put in the boy's reach such medical care and other assistance as the situation might in reason demand so that the pupil might be relieved of his hurt and more serious consequences be avoided.
>
> [Duda v. Gaines, 12 N.J.Super. Ct. 326, 329, 79 A.2d 695, 696 (1951).]

Unless otherwise informed by parents, school officials have the right[13] to administer first aid to children injured while in the custody of

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must give way."); Hoehner v. Bertinato, 67 N.J.Super. 517, 171 A.2d 140 (1961) (An emergency order was issued authorizing transfusions for a child yet unborn where the mother's medical history revealed two children born in danger of death attributable to an R H blood factor); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962) (Order was issued to appoint a guardian for a "blue baby" to consent to transfusions necessary for medical treatment of the child where parents, Jehovah Witnesses, refused to consent.); Santos v. Goldstein, 16 App.Div. 2d 755, 227 N.Y.S. 2d 450 (1962).

[13] This power is not only a right but a duty. See Duda v. Gaines, 12 N.J.Super. 326, 79 A.2d 695 (1951).

the school. On the other hand, if the child's parents are aware of the injury, and choose not to treat it, the school may not interfere. Additionally, if the defect does not require emergency treatment (e.g., dental and visual defects), the school may not substitute its methods of treatment for parental care. Not only will the school be exposing itself to a lawsuit if it negligently treats the child,[14] but it may also interfere with a parent-child relationship recognized by the U. S. Constitution.[15]

B. Tetanus Inoculations

> All students must be vaccinated for smallpox, have three inoculations of DPT (Diphtheria-Pertussis-Tetanus), and two polio inoculations before entering our schools. A third polio inoculation is mandatory which is to be given 7 - 12 months after the second injection. Also, all pupils must have a physical examination and dental examination before entering our schools.
>
> [Red Bank, New Jersey]

Tetanus inoculations fall in this area of constitutional considerations. Tetanus is not a contagious disease. Moreover, there is no emergency demanding immediate treatment (unless the child is injured at school, which may then give rise to a need for immediate inoculation). The traditional justifications for school administered medical treatment are missing. Consequently, does the school have any right to require tetanus inoculations of children? There are no court decisions on this issue, but analogous cases point to an affirmative answer. Because of the highly fatal character of tetanus poisoning, the State has grounds to demand that children of tender years (ages especially susceptible to cuts and scratches) be immunized for their own welfare, despite the objections of parents.[16] Consequently, the State may act through the schools.

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[14] Guerrieri v. Tyson, 147 Pa.Super. 239, 24 A.2d 468 (1942).

[15] In Prince v. Massachusetts, 321 U.S. 158 (1943), the Court posited:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the State cannot enter. (Citations omitted.) Id. at 166

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[16] In addition to the cases cited in Note 12, supra, courts have held that the State may require less than life-or-death medical treatment of children over parental objections.

In re Rotkowitz, 175 Misc. 948, 25 N.Y.S. 2d 624 (1941) (Court ordered operation to cure deformity of child's foot over objection of father. Deformity was induced by poliomyelitis and simple operation would produce a complete cure); In re Vasko, 238 App. Div. 128, 263 N.Y.S. 552 (1933) (Court enforced removal of child's eye which was blind and contained growth which was probably malignant); Mitchell v. Davis, 205 S.W. 2d 812 (Tex. Civ. App. 1947) (State held justified in interference with religious beliefs detrimental to a child when treatment for arthritis or rheumatic fever were not permitted by mother. The child's condition was acute, but probably not fatal); and in England, Oakey v. Jackson, (1914) 1 K.B. 216 (Father ordered to have child's adenoids removed).

But see In re Sieferth, 309 N.Y. 80, 127 N.E. 2d 820 (1955) (Court denied change in custody of child, requested because father refused to allow operation to correct harelip and cleft palate); In re Hudson, 13 W. 2d 632, 126 P. 2d 765 (1942) (Court refused to amputate child's arm over mother's objection, holding her refusal, considering seriousness of operation, did not constitute neglect on mother's part); In re Tuttendario, 21 Pa. Dist. 561 (1911) (Court did not take custody of only child away from parents, who had lost seven other children, for failure to have operation to correct rickets); In re Franks, 41 W. 2d 294, 248 P. 2d 553 (1952) (Court granted custody to father instead of grandmother even though father had failed to provide medical treatment for impediments in child's speech).

C. Dental and Visual Repairs

> No boy can play football without mouth protectors. These are fabricated by our dental supervisor and he has several times refused to fit a mouth protector until dental care was given by a private physician. Of course, if the boy wants to play football, he gets the work done.
>
> [A New York School System]

* * * * *

> [Dental and visual corrections are optional with the parents but the school administration does] have persuasive powers - Society for the Prevention of Cruelty to Children - to forcefully suggest glasses, etc. Rarely needed.
>
> [A Massachusetts School System]

Closer to the constitutional line, but also probably permissable, are school enforced dental and visual corrections. One can easily envision serious physical and educational injuries if dental and visual defects go uncorrected. Physical examinations would also fall in this category. If the right of the school to require correction of these defects is admitted, the corollary right to discover them must also be admitted. 17/

D. Physical Education Classes

> Physical education and health are required for all students. The gym exercises are to be limited to the students' capabilities. Students

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[17] Stone v. Probst, 165 Minn. 361, 206 N.W. 642 (1925) (Requirement of certificate from physician in case of sore throat or suspected diphtheria to be readmitted to school held reasonable despite child's religious beliefs). But see McGilvra v. Seattle School Dist. No. 1, 113 Wash. 619, 194 P. 817 (1921) (Staff of 24 medically trained persons maintained to examine and treat school children held not to be within board of education's powers).

> may be excused from gym by presenting a doctor's excuse. This becomes part of his permanent record.
>
> The only religious objections that we have had is to participation in group dances in gym classes. [Students] are excused if the minister gives us a bona fide list of those students requesting to be excused from gym.
>
> [Upshur County, West Virginia]

The State police power and parens patriae functions may be stretched beyond their limit in requiring children to participate in gymnastics or other physical exercises. Protecting the community health against infectious disease, or protecting children individually against permanent disfigurement is one thing. Requiring them to act positively to improve an existing healthy condition is a qualitatively different matter. In tacit or subconscious recognition of this fact, most school systems defer to religiously-based objections to parts of physical education classes, or to requests for modification of some aspects of the programs. Indeed, many State statutes provide exceptions for religious dissenters.[18] Despite these considerations, the latest court decision, by the Supreme Court of Alabama, held that a child could be compelled to do some gymnastic exercises.[19]

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[18] *E.g.*, Section 280, 14 Code of Iowa, 1962.

All children enrolling in any public, private, parochial or denominational school in Michigan for the first time shall submit either a statement signed by a physician that they have been immunized against Smallpox, Diphtheria, Tetanus, Pertussis and Poliomyelitis; a statement signed by one parent or guardian to the effect that the child has not been immunized because of religious convictions or other objection to immunization; or a request signed by one parent or guardian that the local health department give the needed protective injections.

From Supplement to the 1959 Revision of the General School Laws of Michigan, page 8, (264a) 340.376 Immunization.

That portion of the physical education program which has become the target of most objections appears to be dancing, or its variant, "rythms". The only reported lawsuit involving school-required dancing classes rules in favor of the complaining parents. The case, Hardwick v. Board of School Trustees[20] decided in 1921, recounted that dancing could, to some parents, be offensive to morality. Moreover, the court could see no disruptive features if the child were excused from the class. As a result the court found that the evil of encroaching upon the deeply felt religious wishes of the parents far outweighed the good achieved by compelling the child to dance.

This case puts the balance between health controls and religion to perspective. The court recognized that dancing was not immoral and, moreover, was within the State's powers of education: A parent could not object to dancing classes on the basis that dancing did not improve bodily or physical health. That choice rested within the discretion and expertise of school authorities.[21] On the other hand, the case did hold that some health regulations are not so important to the community or to children that the State can enforce them over religious objections.

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[19] Mitchell v. McCall, 273 Ala. 604, 143 So. 2d 629 (1962). Although physical education courses are a step away from the traditional conception of education, the State may furnish them to students. Callously put, physical training is within the State's power to maintain and develop its natural resources. As the Supreme Court of Montana observed:

> Mentality without physical well-being does not make for good citizenship - the good citizen, the man or woman who is of the greatest value to the State - is one whose every faculty is developed and alert.
>
> McNair v. School District No. 1, 87 Mont. 423, 426, 288 P. 188, 190 (1930).

But is there not an important distinction of what a State may make available to its citizens, and what it can require of them?

[20] 54 Cal.App. 696, 205 Pac. 49 (1921). See also, Mitchell v. McCall, 273 Ala. 614, 143 So. 2d 629 (1962).

From this case answers to other related parental objections may be extrapolated. Here are some examples.

E. Gym Clothing

> Religious reasons do not permit a child to remain out of gym classes. If his religion is against the use of gym suits, we permit him to wear apparel of his own choice but we find in most cases that after a short period of time, this child will conform and wear the regulation gym suit.
>
> Since he wants to be a member of the group and not different, this works out very well.
>
> [An Ohio School System]

Religious objections are sometimes lodged against the wearing of gymnastic uniforms. As may be expected, most administrators honor such requests. By the same token they are probably under a constitutional duty to do so.[22] Balancing the school's interest on standard uniforms against the deeply felt moral convictions of parents and children dictates the necessity of preferring the latter. What significant State interest is fulfilled by requiring uniformity of gymnastic clothing? The aesthetics of similarity perhaps, but little else.[23]

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[21] See also, Rosenberg v. Board of Education, 126 Misc. 542, 92 N. Y. S. 2d 344 (1949) (Plaintiff unsuccessfully sought to ban Oliver Twist and The Merchant of Venice from New York public schools because the books deprecated Jews). But see Kelly v. Ferguson, 95 Neb. 63, 144 N. W. 1039 (1914) (Parent can take child out of domestic science class and subject her in private music instruction).

This is not to say that schools may not prescribe certain modes of acceptable dress, such as trousers and dresses instead of bermuda shorts.[24] The school has an interest in minimum decor, if only to promote a formal atmosphere conducive to serious study and learning. This is a balancing process, with the State possessing some justification for the regulation, and an absence of a countervailing religious objection on the other side of the scale.[25]

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[22] The Alabama Supreme Court commented that a girl could not be compelled over her religious objections, to wear an abbreviated gym costume, nor could she be compelled to participate in "exercises which would be immodest in ordinary apparel." The court did hold, however, that she could be compelled to attend the course in physical education. Mitchell v. McCall, 273 Ala. 604, 143 So. 2d 629 (1962).

[23] See Valentine v. Independent School District, 191 Iowa 1100, 183 N.W. 434 (1921), holding that school board could not deprive student of an otherwise earned diploma when student refused to wear an academic cap and robe at graduation. The court held this was too high a price for uniformity.

[24] The most extreme rule may be the one upheld by the Arkansas Supreme Court in 1923. The rule read:

> The wearing of transparent hosiery, low-necked dresses, or any style of clothing tending toward immodesty in dress, or the use of face paint or comestics, is prohibited.
>
> Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923).

[25] An Indianpolis School official recounted a vignette of one student

III. POLICY EXCEPTIONS FOR RELIGION

> We have not excused pupils from physical education classes for religious reasons. One student has been excused from taking a shower after physical education classes because her parents objected on religious grounds.
>
> [Name of School System Withheld]

* * * * *

> Tuberculosis tests and/or X-rays of chests required except for exemption for religious reasons. Even so, if [there is a suspicion] of tuberculosis, the tests are required of everybody.
>
> [Wauwatosa, Wisconsin]

* * * * *

> Vaccinations and dental repairs are recommended to all students who are in need. Exceptions are made if parents are religious fanatics and make requests to that effect.
>
> [A Louisiana School Official]

Virtually all States have made some concessions in health policies to minority religious groups. These exceptions are extant in regulations ranging from State statutes all the way down to informal and unpublicized practices of particular school systems. The exceptions pronounce the inconsistencies of health regulations generally. For example, the New

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who insisted on wearing a mustache. This caused considerable amount of comment and antagonism by other students. Although the parents of the boy first resisted requests that he shave, they finally capitulated. The school was probably justified in requiring the boy to shave although it could be argued that the school's remedy was in suppressing the antagonism and not the boy. In Lemard v. School Committee of Attleboro, 212 N.E.2d 468 (Mass. 1965), the Massachusetts Supreme Court held that an unusual hairstyle could disrupt proper classroom atmosphere, and thus be regulated.

Jersey statutes requiring immunization against diphtheria[26] and smallpox[27] give local boards of education the *discretion* to make exceptions for religious objectors, but the poliomyelitis statute[28] *requires* exceptions for religious objectors.[29] Again, in Dade County, Florida ". . . religious reasons for excusal from classroom health instruction are honored, but not for outdoor physical activities."

Religious exceptions, or any exceptions for that matter, stir the constitutional problem of equal protection of the laws. The Fourteenth Amendment forbids State officials from denying any person the equal protection of the laws. The rudiment of this prohibition is that a State may not, *without good reason*, treat some citizens differently than others, or give preferential treatment to some citizens over other citizens. The touchstone of this principle is the area of *reasonable* classification. Children may be treated differently from adults,[30] women may be subjected to different regulations than men,[31] and aliens may be subjected to rules not applied to citizens.[32] Obversely, distinctions drawn by States on bases of color,[33] wealth,[34] and ancestry[35] have been declared arbitrary by the Supreme Court.

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[26] N.J.S.A. 18:14-64.2 (L. 1939, c. 299).

[27] N.J.S.A. 18:14-52 (L. 1952, c. 152).

[28] N.J.S.A. 18:14-64.10 (L. 1957, c. 133).

[29] The writer must confess that the subtlety of this distinction escapes him. *Cf.* Board of Education v. Maas, 56 N.J.Super. 245, 152 A.2d 394 (1959).

The Cincinnati School System honors religious objections to poliomyelitis, diphtheria, pertussis and tetanus, but not to smallpox. See *Ohio Rev. Code*, Sec. 3313.671.

[30] U. S. v. Darby, 312 U.S. 100 (1941) (upheld the constitutionality of restrictions on child labor).

Two areas of discrimination in health controls loom large. The first lies in the definition of religion. Some statutes will excuse students from health regulations if they are members of a nationally recognized religion.[36] Provisos of this nature favor nationally recognized religions over smaller sects, and in so doing, violate the equal protection clause of the Fourteenth Amendment. Moreover, these provisos violate the freedom of religion guarantees of the Fourteenth Amendment because they favor one religion over another.

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[31] Muller v. Oregon, 208 U.S. 412 (1908) (a statute limiting the hours a woman could work to ten hours per day, upheld against a claim that it arbitrarily excluded men from its coverage).

[32] Heim v. McCall, 239 U.S. 175 (1915) (aliens not employable on public works projects); Terrace v. Thompson, 263 U.S. 197 (1923) (aliens who were ineligible for citizenship not permitted to hold land for farming or other purposes); Clarke v. Deckebach, 274 U.S. 392 (1927) (aliens not permitted to conduct pool and billiard rooms). Perhaps the tradition of zenophobia has been weakened by Schneider v. Rusk, 377 U.S. 163 (1964) (holding that a naturalized citizen must be treated the same as a native born citizen by the expatriation laws).

[33] Brown v. Board of Education, 347 U.S. 483 (1954) (segregated education based on race held unconstitutional).

[34] Griffin v. Illinois, 351 U.S. 12 (1956) (an indigent criminal cannot be denied an appeal because he cannot pay for the necessary papers).

[35] *But see* Hirabayashi v. U. S., 320 U.S. 81 (1943); Korematau v. U.S., 323 U.S. 214 (1944) (the internment of U.S. citizens of Japanese ancestry during World War II held constitutional). The detachment of history has provided a climate for uniform criticism of these cases, *e.g.*, Grodzins, *Americans Betrayed*, Univ. of Chicago Press (1949).

A second problem raised by religious exceptions to health regulations occurs when approval is required of a clergyman of the objecting faith, for example, a letter from a local pastor or as one school system requires, a request in writing from "the authorized State representative" of the religious group. The constitutional defect in this procedure is not immediately apparent, but it is nevertheless present, and it sounds the foundations of religious freedom. A man's religion is personal. It does not stand or fall, for constitutional purposes, on the tenets of the church or church leader, with whom a citizen associates. Consequently, if a parent's religious inclinations demand his child be excused from certain school regulations, but his minister disagrees, the parent's wishes must be respected.[37] To hold otherwise would impersonalize religion. It would in effect favor a formal religion over personal religion, an

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[36] The Kentucky statute excepts members of a "nationally recognized and established church or religious denomination." KRS 214.036.

[37] But see Anderson v. State, 84 Ga.App. 259, 65 S.E. 2d 848 (1951). In this case the school board agreed to suspend a vaccination requirement if the pastor of the parents' church signed a statement that the sect was opposed to vaccinations. The pastor refused. The Court held against the parents, but apparently counsel for the parents did not bring the unconstitutional character of the exception to the Court's attention.

arbitrary discrimination. [38]

The foregoing is not to say that school authorities are consciously guilty of religious discrimination. Indeed, a requirement of a letter from a parent's minister may be motivated by the desire to have the parent clarify his own religious attitudes - that is, to make certain his requests actually are tenets of his professed faith. If the minister of the parent's church approves the questioned school practice, it is probable that the parent would withdraw his objections, but if the parent disagrees with the minister, the school must respect the parent's wishes.

The final issue of religious exceptions to school health practices plumbs all the subtleties of the role of religion in our constitutional scheme. It arises when a parent objects to school practices not on religious grounds but on moral grounds.

Although personal ethics may be religiously based they need not be, and conceiveably parents may object to particular school functions on purely ethical grounds. The best examples are the parental objections to post-gymnasium showers for teenage girls. (One school official reported that this area posed a major problem in his school.) These objections, whether instigated by the girl or parents, are most often couched in religious wrappings. Nevertheless, one may infer that the real basis of objection may be mixtures of embarrassment and a desire for personal privacy. Both these reasons are ethically justifiable, but not, perhaps, religiously so.

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[38] As early as 1890 the Supreme Court stated:

> The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter.
>
> Davis v. Beason, 133 U.S. 333, 342.

See also, Hardwick v. Board of School Trustees, 54 Cal.App. 696, 205 Pac. 49 (1921).

The dilemma resolves to this: If religiously-based requests are favored over ethically-based requests, is the school administration favoring religion to an unconstitutional degree? The answer is yes. The Fourteenth Amendment guarantees a person not only freedom of religion but freedom of ethical decision, the freedom of a personal credo, whether or not structured on the existence of a Supreme Being. 39/ Consequently, the State may not discriminate between theistic and atheistic positions.

In an overview, the Constitution requires that if a school is disposed to allow religious objections to health regulations, it must allow all ethical

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[39] Torcaso v. Watkins, 267 U.S. 488 (1961) (State statute requiring an oath based on a belief in God as a prerequisite to office of notary public held unconstitutional).

The Selective Service laws exempt persons from the Armed Forces who conscientiously object to serving because of "a belief in a relation to a Supreme Being." When an atheistic humanist objected on moral grounds to military service, a Federal Court of Appeals upheld him, stating that the "Supreme Being" requirement was an arbitrary limitation on personal ethics. U.S. v. Seeger, 326 F.2d 846 (2nd Cir. 1964), aff'd 380 U.S. 163 (1965).

objections.[40] It matters not whether the objections are based on a nationally recognized religion, receive the approval of the local minister, or are in fact lodged by an athiest.

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[40] The New Jersey Superior Court in Kolheck v. Kramer, 202 A. 2d 889 (1964) (held that Rutgers University, the State University of New Jersey, could not refuse to except a student from vaccination requirements because the school authorities doubted the sincerity of the student's belief).

CHAPTER VII

EXPULSION OF STUDENTS: MINIMUM CONSTITUTIONAL SAFEGUARDS

> No student has been "expelled" during my eight years' tenure here. There have been some students counselled out of school. If they should have refused to drop out, they would have been expelled. This would have involved action by the principal concurred in by the Superintendent with information going to the Board if the action had been taken. If the pupil were to have refused to remain out of school beyond the three-day suspension which the principal could administer without Board action, the case would have been presented to the Board with the request that the Board act to expel the student. The Board probably would take such action, allowing the student and parent a hearing if requested.
>
> [Name of School District Withheld]

The preceding part of this report has, by and large, considered what a school may do to a student. This chapter will deal with how the school may do it. In other words, this chapter will consider the constitutional how-to-do-it of the expulsion process.

I. THE PRECEDENTS

> Procedures for expulsion involve counseling by school personnel with the child and with the parents, sometimes advising the parents it would be desirable if they kept the child at home for the rest of the semester, or, as a last resort, exercising the legal provisions of Oregon Law and bring formal recommendation through the Superintendent to the School Board involving the act of expulsion. There are no provisions for, nor does the School Board exercise any pattern of, hearings on these matters; the recommendation of the Administration is considered sufficient and adequate under law and regulation.
>
> [An Oregon School District]

The cases involving student expulsion before the turn of the twentieth century revealed two pheonomena. The first was that school administrations in general were not inclined to elaborate hearing procedures when expelling students. The cases, generally involving college students, upheld the crudest hearing procedures while giving lip service to the thought that a hearing must be fair.[1] The second phenomenon was that courts were almost always inclined to condone whatever procedures the school administrations actually used. And this caused the late Professor Seavey of the Harvard Law School to remark with chagrin:[2]

> . . . our sense of justice should be outraged by denial to students of the normal safeguards. It is shocking that the officials of a State Educational institution, which can function properly only if our freedoms are preserved, should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket.

In the 1960's the current changed, and, ironically, the beacon cases were generated by another constitutional battle, that for civil rights. The cases all have similar factual backgrounds. In short,

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[1] Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924); Morrison v. City of Lawrence, 181 Mass. 127, 63 N.E. 400 (1902). State ex rel. Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942), cert. denied, 319 U.S. 748 (1943); Smith v. Board of Education, 182 Ill.App. 342 (1913); Vermillion v. State ex rel. Engelhardt, 78 Neb. 107, 110 N.W. 736 (1907).

[2] Seavey, Dismissal of Students: Due Process, 70 Harv.L. Rev. 1406-7 (1957).

Negro students were dismissed from State run educational institutions[3] because of their involvement in court proceedings which resulted from their civil rights activities.

Clearly the landmark case of these three cases is Dixon v. Alabama State Bd. of Education[4] decided in 1961. There a federal appellate court decided that the elements of an adversary proceeding had to be present in the dismissal processes of public education. The second case, Due v. Florida A & M Univ.,[5] decided two years later emphasized the necessity of more than going through the motions. On the other hand, the court suggested that too elaborate procedural means may defeat the purpose of a hearing[6]

> Procedures are subject to refinement and improvement in the never-ending effort to assure not only fairness. More specific routines of notice and advisement may be indicated in this regard, but a foisted system of rigid procedure can become so ritualistic, dogmatic, and impractical as to itself be a denial of due process. The touchstones in this area are fairness and reasonableness.

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[3] Two institutions were State colleges and one was a public high school. No considerations were given to the different levels of public education, clearly implying that there is no difference as regards expulsion procedures.

[4] 294 F. 2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

[5] 233 F. Supp. 396 (N.D. Fla. 1963).

[6] Id. at 403.

The third and most recent of this genre was Woods v. Wright[7] summarily reaffirming the principles announced in its predecessors. Moreover, in the Woods case the court held expulsion could be such a severe act that a court could restrain it immediately, pending a hearing on the merits.

II. APPLICABILITY OF THE PRECEDENTS TO CONTEMPORARY EXPULSION PROCESSES

> Ordinarily there is no hearing, but the school board is willing to provide the opportunity. Actually, the law provides for a hearing. There is no appeal from the board decision except the parent of the expelled child can always petition our district court for an injunction. No one has done this to my knowledge.
>
> [Name of School District Withheld]

The recent cases clearly point out that a student has a constitutional right to a hearing as an incident to his expulsion from public schools. But they do not as clearly answer the question of what kind of a hearing and, in the everyday administration of school affairs, this is the most important inquiry.

One approach and the easiest to follow in analyzing the various required steps in a constitutionally acceptable hearing is the chronological one. That is, taking the proceedings to their initiation. That will be used here.

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[7] 334 F.2d 369 (5th Cir. 1964); Cf. Knight v. State Bd. of Educ., 200 F.Supp. 174 (M.D. Tenn. 1961).

A. Notice of Proceedings

"Mrs. John Doe
_______________ Road
_______________, Ohio

Dear Mrs. Doe:

It has become necessary to expel your son, _______, from school for the remainder of the School Year 1958-59 under Section 3313.66, Suspension of Expulsion, of the Ohio School Code. Your son has been guilty of continued non-excused absence and tardiness, which is subversive of the discipline of the school, and breach of the school rules.

Your son has been counseled on numerous occasions about the above offenses and has failed to cooperate. Therefore, this procedure became necessary.

As parent of the above mentioned child, if you feel that the expulsion is unjustified, you are entitled to appeal the action to the board of education at any meeting of the board and shall be permitted to be heard against the expulsion. By the above action, your son is expelled for the remainder of this school year and will be permitted to re-enter school in September, 1964.

Sincerely,
_________PUBLIC SCHOOLS

____
Superintendent"

[An Ohio School District]

A fair adversarial hearing presupposes an equality of adversaries. This fundamental presupposition is the touchstone of many of the necessary incidents of a fair hearing, and it is the touchstone of the requirement that adequate notice of the hearing be given to the parents of the child.

Notice of expulsion proceedings does not mean simply telling the parents of the child that a hearing will be held at such-and-such a time and they can appear as they wish. They must be informed of the charges and of the names of the witnesses against the child. How could they procure evidence and witnesses to refute the charges against the child if they didn't know the charges? Moreover, how could they be prepared to refute or explain away the testimony to be offered against the student unless they know the names of the witnesses against him, and the nature of their accusations? This information is available to defendants in the common automobile accident case. Shouldn't it be likewise available to an individual about to suffer the obloquy of dismissal from school? (To say nothing of the loss of lifetime earnings that will attend the educationally stunted person.)[8] Thus, when placed in the spotlight of fairplay, it becomes plain that "a student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies."[9]

The charges against the student should be set out with sufficient specificity that the parents or their attorney can prepare a defense. For example, a statement that the student is to be expelled for misconduct is not sufficient. The specific acts and the time of their occurrence would be the proper information, satisfying due process of law.[10]

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[8] See 1963 STATISTICAL ABSTRACT OF THE UNITED STATES 122.

[9] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961). An earlier case took a contrary view as regards identifying witnesses against the accused student. Apparently blind to the gaping inequality of treatment of the two classes of students, one the witnesses, the other the accused, the court remarked "honorable students do not like to be known as snoopers and informers against their fellows." State ex rel. Sherman v. Hyman, 180 Tenn. 99, 110, 171 S.W.2d 822, 826 (1942), cert. denied, 310 U.S. 748 (1943). Hopefully this case belongs to a curious past.

B. Right to Counsel

> 1. The principal notifies in writing the parent and the School Board that the pupil is suspended and he is requesting expulsion by the School Board. He also outlines the reason for the request.
>
> 2. The School Board reviews the case at which time the parent, lawyer, principal and any others involved may be present. The state law does not provide for an appeal but the case can be reviewed by the State Board of Education as in other action of the local school board.
>
> [A Virginia School District]

Expulsion proceedings are adversary in nature, not inquisitorial. The opponents are the pupil and the complaining school administrator. The judges are the school board members. In such a contest it is necessary that the opponents be of equal ability. Otherwise the true facts may never come to light, being suppressed through the superior maneuverings of one of the contestants. On this ground alone fair play would seem to dictate that counsel be permitted the pupil.[11]

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[10] No attention here has been given to the mechanics of getting the notice to the parents or guardian of the accused child. Because the addresses of these people are known to the school there should be no problem in getting the information to them. See generally Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

For examples of State regulations concerning written notice, see Conn Gen. Stat. Rev. Sec. 10-234 (1958); Mass. Ann. Laws Ch. 76, Sec. 16 (1954).

[11] Geiger v. Mifford Independent School District, 51 Pa. D & C Rep. 647 (Pa. 1944).

Another consideration dictates that an attorney be permitted to represent and advise the student. It is that the student is in jeopardy of losing a very valuable right, that of an education. Consequently, the State must allow him the protection it would allow a homeowner whose property is taken by eminent domain. Indeed, recent Supreme Court decisions show a jealous concern for the individual's right to be advised by counsel.[12]

Over-all, although no case has specifically covered the issue, it appears that a student would be constitutionally privileged to have the assistance of counsel at an expulsion proceeding.[13]

C. The Hearing

> The student is brought before the Principal or Superintendent and the case against him stated; then the authority invested in those gentlemen takes place. If they think that the crime is sufficient, then the student is expelled and must bring back his parents before he can get back into school again. This first expulsion is generally for three days. Some teachers, and they are right, will not put up with any disobedience; . . . . The Principal or Superintendent can make the necessary arrangements with the teacher for the pupil to get back in class but he has to walk the chalk line. If he misbehaves again, out he goes and no return. [We] look on his permanent records to find out how many classes he has been kicked out of. If he wants to go to school let him go to school, and if he is going to play let him go elsewhere. There

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[12] Gideon v. Wainwright, 372 U.S. 335 (1963); Escobedo v. Illinois, 378 U.S. 478 (1964).

[13] Whether the school would have to furnish him counsel if the student could not afford counsel is another question, to which an answer would at best be conjectural. *Cf.* cases cited in the previous footnote.

> is always the appeal to the Board of Education. They are the final authority as they are elected by the people of that school district to look after the schools. They want it run like a business; they want the best instruction possible for the boys and girls of that school district. If he wants to go to school let him go to school; if not let him drop out.
>
> There has to be a reason back of the expulsion; [we] find out what is happening and get the difficulty straightened out if possible. Some students just don't want to study and they are looking for a good time.
>
> If they want an education they will get it if you provide them with the opportunity, but if they don't want to study then you nor anyone else can make them.
>
> [A Colorado School District]

Any hearing by a school board concerning the expulsion of a student presents several problems in its very nature. The primary trouble spot is that the school board is not a dispassionate adjudicatory body aloof from both the school administrators and the child. The school board, in most of its functions, is a part of the school administration. Consequently, a personal involvement, and even prejudice for the school administration, is difficult to avoid. The danger is compounded when the charge against the pupil is based on an infraction of rules laid down by the school board itself.

A second problem is that the board cannot compel the attendance of witnesses, and even if they attend, cannot compel testimony. Related to this problem is the dissuasive effect the board and school administration may have on the willingness of fellow students to testify on the accused student's behalf. Aside from the preceding fundamental defects, problems of recording the testimony, of ascertaining what testimony is privileged, and what evidence (e.g. secret or personal knowledge of school board members) may be considered in determining culpability are also present.

All in all, if the inherent pitfalls and problems in the nature of the proceedings are kept in mind, what appears to be an overconcern with a student's rights may be more correctly viewed as simply compensating for the balance against him. Now to the specifics.

D. Legal Rules Of Evidence

> Building principal requests in writing stating details of case to superintendent. Superintendent then recommends expulsion to Board. Board of Directors takes official action in regular meeting. There is no hearing or appeal, except stating the case by the injured party to the Board of Directors and asking that action be rescinded.
>
> [A Washington State School District]

Formal rules of evidence, such as the inadmissible characteristics of hearsay in regular court proceedings, do not and should not apply to school board hearings. Here the layman character of the board makes this a necessary sacrifice to the exigencies of school administration. However, some constitutionally fundamental rules of evidence would seem to apply even in these proceedings. These rules follow.

incriminating testimony

> I did expel one boy in the 8th grade who was 15 years old. He drew a switch-blade knife on a teacher. We had a hearing on the episode at which the student, both parents, and principal were present before the County Judge. The boy had been in lots of other trouble prior to this and we felt this action was justified due to the circumstances. There was no appeal in this case because the parents had no control over the boy and did not try to keep him in school.
>
> [A Kentucky School District]

The Supreme Court has held that a person has absolute right to refuse to testify to anything which may tend to incriminate him.[14] Moreover, the fact that a defendant in a criminal proceeding refuses to testify may not be used as evidence of his guilt or inability to deny the charges.[15] If this rule can be carried over to the school board hearing, it appears that an accused student can remain silent and require the school administration to prove its case against him.

substantial evidence rule

> We have a number of parole students enrolled in school. Most of these get along fine. However, if they cause trouble, we are not going to put up with their actions in this school.
>
> [A Wyoming School District]

The judgment by the school board that the student committed the alleged acts must rest on some substantial evidence. General bad reputation of the student, or the commission of similar acts in the past, is not sufficient.[16] Although this rule appears just common sense, one might question how many reputed troublemakers have been expelled or persuaded to leave school because of a minor infraction coupled with bad reputation.

secret evidence

> A child may be suspended by a principal. Only the board of education may expel. However, in some cases suspension becomes expulsion

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[14] Malloy v. Hogan, 378 U.S. 1 (1964).

[15] Ibid.

[16] Thompson v. City of Louisville, 362 U.S. 199 (1960); Cf. Garner v. Louisiana, 368 U.S. 157 (1961).

> without board action if parents accept the permanent suspension. Legally, however, the principal does not possess expulsive power.
>
> [A Michigan School District]

Any evidence against the student should be made available to the student. Otherwise the obvious unfairness of battling the unknown would tip the constitutional balance against the board. Moreover, if the evidence is testimony, or information furnished by witnesses, the accused student should be supplied with the names of the witnesses and the content of their testimonies.[17]

right to confront and cross-examine witnesses

> There are few subjects, perhaps, upon which this court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.
>
> Pointer v. Texas,
> 380 U.S. 400, 405 (1965)

In criminal cases the Supreme Court has held that a defendant has an absolute right to confront the witnesses against him. The reason is that many times testimony may not be disproven by evidence other than the informer's own recantation or qualifications. Moreover, testimony many times will be conclusionary, that is, show only the witnesses' impressions and not the facts upon which the impressions are based. For example, a statement that a pupil had an incorrigibly bad character may or may not be based on competent or substantial evidence of that character. And if the witness may not be cross-examined by the student, how will the integrity of the statement be known?

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[17] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942); See generally 58 A.L.R. 2d 903.

Nevertheless, despite all the reasons which would seem to dictate a right to cross-examine, the courts have held the student does not have that right.[18] The judicial thinking, when expressed on the point, has been that cross-examination is too disruptive for the scholastic decorum of a school board hearing. The fact that the school cannot compel the attendance of witnesses has also been quoted as a reason to forego cross-examination.[19]

E. Conclusion

In an overview, the fact finding process in a school board hearing appears more inquisitorial than adversarial. The lack of cross-examination (a foundation of the adversarial system) points this up. Although an attorney may represent the student, his function seems to be only to adduce evidence for his client, not to attack the evidence of the opponents. Whether this type proceeding will continue to pass constitutional muster is doubtful.[20]

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[18] Ibid.

[19] People ex rel. Bluett v. Board of Trustees of Univ. of Illinois, 10 Ill. App. 2d 207, 134 N.E. 2d 635 (1956).

[20] For further readings see Comment, School Expulsions and Due Process, 14 Kan. L. Rev. 108 (1965); Comment, College Disciplinary Proceedings, 18 Vand. L. Rev. 819 (1965); Seavey, Dismissal of Students: Due Process, 70 Harv. L. Rev. 1406 (1957).

CHAPTER VIII

CONCLUSIONS

Each chapter has included specific conclusions as regards the specific area covered. A review of these conclusions is unnecessary. On the other hand, some over-all observations may be made. They are:

1. School officials, from teachers to the boards of education need to know what their constitutional responsibilities are to their students.
2. Insofar as a school administration does not seek, or recognize, its constitutional responsibilities to its students, it will be avoiding its moral and legal duties to its charges. And as enlightenment to democratic freedoms and rights spreads to students, either in school or graduated, a contempt for school administrators will redound.
3. School administrators should have some institutional source of constitutional information. A handbook, or set of guidelines, supplemented annually to include recent decisions, would be valuable. The Federal government, acting through the Office of Education, may very well be the proper agency to be such a clearing house.
4. Schools of Education, in their curricula for school

administrators, should include a course not only on school law generally, but on the Federal constitutional limitations on school management. Besides pointing out the proper constitutional methods for school administration, such a course should present the ethical implications inherent in school administration.

5. School regulations should be periodically reviewed by the school board attorney to determine their current constitutional status. Indeed, before any rule or regulation is promulgated, it should be reviewed critically by an attorney.

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